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## Definitions

### A Tort.

a tort is a breach of duty established by municipal law for which a suit for damages can be maintained.

### Malice.

Malice, in common acceptance means ill will against a person but, in its legal sense, it means a wrongful act done intentionally, without just cause or excuse.



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1 <sup>st</sup>	lecture	§ 110 - 145
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3 <sup>rd</sup>	"	181 - 204
4 <sup>th</sup>	"	103 - 115
5 <sup>th</sup>	"	115 - 135
6 <sup>th</sup>	"	
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21 <sup>st</sup>	"	



# THE LAW OF TORTS



# THE LAW OF TORTS

BY

MELVILLE MADISON BIGELOW

PH.D. HARVARD

SEVENTH EDITION

BOSTON

LITTLE, BROWN, AND COMPANY

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## PREFACE

TO THE SEVENTH EDITION.

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SOME changes of classification in this edition should be pointed out. Part I. is now entitled Lawful Acts done by Wrongful Means or of Malice, and Part II., Unlawful Acts; the explanation of which will be found in paragraphs 25-31. A readjustment of several chapters has been made accordingly.

Slander of Title, being a specific tort of growing importance, is now made a distinct chapter.

Malicious Interference with Contract, of former editions, becomes, as the result of recent decisions, two chapters, Maliciously Procuring Refusal to Contract, and Procuring Breach of Contract; the first as the last chapter of Part I., the second as the first chapter of Part II. On this subject see the consideration of malice, in paragraphs 35-50.

In Part III., Negligence, certain gaps have been filled, and the whole subject completed on the lines laid out for it.

The whole field of tort is now accordingly covered, in general theory, and the work for the first time completed. If the reader cares to see the starting point, he is referred to the Preface, p. vii, of my *Leading Cases on Torts* (1875).

M. M. B.

Boston, January 1, 1901.



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GENERAL PART.

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GENERAL THEORY AND DOCTRINE.





# THE LAW OF TORTS.

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## GENERAL THEORY AND DOCTRINE.

*omit to § 22*

### § 1. OF LEGAL RIGHT: DOMAIN OF TORT.

1. THE sphere of action of a citizen, in his relation to the law, is found in his rights, privileges in the sense of permissions, and duties. What a citizen may lawfully do is determined by his legal rights and privileges; what he must do is determined by his legal duties. These duties however only correspond to the rights and privileges of others; hence a man's rights and privileges, limited as they are by like rights and privileges in others, juristically express the extent of his sphere of action as a citizen under municipal law. But it will be found important to consider duties independently, in any endeavor to state the law of torts; indeed it would be fairly out of the question to state the law adequately and clearly in terms of legal right.

Right, privilege, and duty.

2. It is of first importance then to get a clear conception of the meaning in law of right, privilege, and duty, as these terms are employed in the foregoing paragraph. The general notion of the first may be put thus: In legal rights lie ordinarily one's positive powers,<sup>1</sup> as a possession in hand with which to set the law in motion against one's neighbor upon occasion; in other words, legal rights ordinarily furnish ground upon which one man may have an action against another.<sup>2</sup>

Legal right explained.

<sup>1</sup> The rights conferred upon corporations are indeed commonly called powers. Rights often appear under the name of powers.

<sup>2</sup> Sometimes the infringement of a legal right may not give an action, as for instance infringement of the legal right of a person on trial for

3. It should however be observed that the term 'right' is occasionally used in law books (as well as in popular speech) in a broad and rather loose sense which makes it include privilege. Thus, even in the use of legal language, a person will sometimes say that he had a 'right' to be upon certain premises on a certain occasion because he was allowed by the owner or by the law to go there; the case not requiring, it may be, any exact statement of the situation. The truth is, that the person was there, not by right, not as having positive powers under which he could sue the owner; he was there only by permission,<sup>1</sup> so that no suit could be brought against him for being there. This use of the term 'right' must then be set aside as embraced under the term 'privilege,' to be considered presently, and the term 'right' considered in its proper sense.

4. In its proper sense, as importing active powers, right, apart perhaps from a class of cases to be spoken of later, signifies the control or the authority of the will over some object tangible or intangible. When an object is not within the control or the authority of my will, as in the case of light and air, or the free fish in a stream, though the stream run through my land, then (apart from the special cases) I have no right, in the legal sense, to or over that object. I may have a right in *respect* of it, as where I have a contract in virtue of which a house may sometime become mine, and for some special purposes in equity I may be considered to have a right over the house; but in the generally accepted and proper sense of the word I have no legal right to or over it. The house is not mine in whole or in part; my 'right' is over the vendor only.

5. It should however be observed that conduct may be 'rightful' in the legal sense, though it may not be of legal right. The term 'rightful' imports in law no more than

crime, before the petit jury, to have the prosecution carried forward to a verdict. But the law will always give effect to the right in some way; in the case just put the infringement works an acquittal of the prisoner. See *Commonwealth v. Tuck*, 20 Pick. 356, 365.

<sup>1</sup> Or 'license,' in technical language.

that the act or omission need not be 'justified,' that is, that it is not even presumptively wrongful. Conduct therefore is 'rightful' when it is permitted or privileged, though but conditionally or not of full right. Thus it is 'rightful' to prosecute a man without reasonable or probable cause; not, as will appear later, in the sense that the prosecutor has a legal right to do so, but in the sense that he will not have to 'justify' such an act if afterwards sued for it. The act is not presumptively unlawful; other facts must be added to make it so, — without them the prosecution is permitted or privileged.<sup>1</sup>

6. In regard to legal right as above described, an object is within the control of my will when I have full power over it. It may or may not be in my hands or within my reach; enough still that there is nothing to prevent my exercising control over it at will, so far as any interference of others is concerned. An object is within the authority, as distinguished from the control, of my will when I am wrongfully deprived, in whole or in part, of my control over it without losing title to it, as for example when my horse is stolen or otherwise wrongfully taken or withheld from my proper control. And anything may be within the control or the authority of my will which is the means whereby I am to acquire legal rights. The means must be commensurate with the end. I have a legal right to a livelihood; hence I have a legal right to all reasonable means to obtain it; I have a legal right to a good name; I have a legal right to seek contracts, to enter into business, to pursue studies, to bring suits and prosecutions, to attach property, — to do or refrain from doing a thousand things suitable to the end of obtaining a livelihood.

7. In certain cases the judges have found it desirable to extend the meaning of the term 'right' beyond its more obvious and unstudied sense as above given; they have de-

<sup>1</sup> So it should be noticed 'wrongful' does not necessarily import a wrong in the legal sense, but only something helping to make a wrong; as for instance a false representation.

clared the existence of a class of legal rights over objects not fully and for all purposes within the control or the authority of one's will, the rights being such against wrongdoers only. Of this class are rights to the enjoyment of a gratuity, such as the benefit of a life insurance policy kept up on one's own life for one's sister, at the sole expense of the insured,<sup>1</sup> or the benefit of another's gratuitous hospitality,<sup>2</sup> or of a license. There may be other instances of legal rights of like or other special nature.

8. These special cases are explainable as resting upon sufficient grounds, even if they are not to be deemed as relating to objects virtually within the authority of the will. Indeed it seems fair to say that towards one interfering, without just cause or excuse, in the enjoyment of a bounty by another, the bounty, as it is 'being received, is within the control of the will of the person receiving it, and towards the same person the continuance of the bounty, so far as it is likely to continue if unimpeded, is within the authority of his will. On the whole it appears reasonable to say, of all this special class of cases, that the wrong consists in unjustifiable interference with the natural and proper exercise of the will; that is, that such exercise of the will, speaking generally, falls within the technical designation of legal right.

9. It should be remembered that legal right extends over the intangible as well as the tangible. An intangible object, such as reputation, may be within the control or authority of the will as much as a tangible object, such as property. I may keep or impair my good name at will; I may keep or barter away my 'good will' in business; I may or I may not permit another to defraud me to my hurt.

10. It is proper now to inquire what rights are within the domain of the law of torts.

<sup>1</sup> Lord v. Dall, 12 Mass. 115.

<sup>2</sup> Williams v. Hill, 19 Wend. 305.

11. Rights are either of substantive or of procedural law. With procedural rights we are not concerned; this book treats only of substantive law, not of the machinery by which the law is enforced. Rights of substantive law (and indeed of procedural law, but not on the same lines), in accordance with a division and nomenclature adopted from the Roman law, are in *rem* or in *personam*. Rights in *rem* avail against all the world; rights in *personam*, only against certain defined or ascertainable persons. The typical example of a right in *rem* is a right of property; *proprioire vigore*, that may be enforced against any one and every one whenever occasion arises. The typical example of a right in *personam* is a right of contract; that right — the contract right — can be enforced only between the parties to it and their successors. But just as one has the right to enter into contracts freely, so after a contract has been made each of the parties has a corresponding right that others shall not hinder the performance of it without just cause or excuse. It results that a right in *personam* *may* generate a (quasi?) right in *rem*. But the product, it should be noticed, is a very different thing from that which produces it.

12. The law of torts relates both to rights in *rem* and to rights in *personam*, though most torts are breaches of rights availing against all the world, that is, are breaches of rights in *rem*.

13. Another way of putting the Roman division of rights will be found helpful, as serving to explain the origin as well as the nature of rights; and that is by saying that rights are paramount or consensual; the first kind designating those which exist independently of the will of individuals; the second, those which come into existence by consent, actual or presumptive.

14. Both classes alike, whichever way designated, create law, in the very proper sense of that which, lying fast (*lex*, *legare*), binds men together; for law consists merely in those relations between citizens which are deemed necessary or

helpful to bind citizens together into the organism called the State, and to find those relations is to find the law. Hence both kinds of right are paramount in a sense; but the one kind exists originally and of its own efficacy and is universal, while the other is brought into existence, typically, by the agreement of two or more persons, and, generally speaking, governs them alone. Still, even with regard to the latter kind of rights, the judges have found it desirable to hold that the relations of the parties to the thing agreed upon are not in all respects consensual, in the sense that there can be no right or duty paramount to the will of the parties in the subject of agreement, a matter to which further attention will be called later on. The law of torts deals with both classes of rights; with the first class generally, with the second so far as the rights are treated as paramount to the will of the parties. In a word, the domain of the law of torts, so far as rights are concerned, lies in rights paramount, and hence tort, as a ground of action, consists in the breach of a right paramount, that is, of rights established by municipal law.

## § 2. OF LEGAL PRIVILEGE.

15. Privilege may indeed include legal right, as where it consists in special powers granted by law, of which riparian water privileges would be an example, or where it is absolute, of which exemption of a member of the Legislature from liability for words spoken in that capacity would be an example. In that sense it has been disposed of. But the term is also used, as we have already indicated, of mere permissions. In this sense it falls short of full legal right; towards the person granting it it is now purely negative in character; it does not furnish ground for an action against him. It imports protection, but protection from an action by the party who has conferred it, and not in the way of a ground of action against him. Towards third persons it may indeed confer a right of action, as in the case of a license to enter land, where entry is interrupted by a

Privilege in  
sense of mere  
permission.



stranger.<sup>1</sup> But we are not now concerned with the term in any of its aspects of legal right.

16. The conception of privilege thus set forth embraces permission of two kinds: first, permission 'by the party,' that is, by some person granting it; and, secondly, permission 'by the law,' or permission paramount, Kinds and names of privilege. since it is independent of the will of the person against whom it is granted. In either of these cases the privilege may or may not amount to legal right, as the examples already given show.

17. In the law books privilege in both senses is found under various designations. In the law of defamation it is called 'privileged communication;' in the law of trespass to property it is called 'license;' and so on. Often the word 'justification,' taken from the language of pleading, is used as a general, synonymous designation of the idea.<sup>2</sup> In substance however it will always be found to amount to permission, under reasonable limits, to inflict harm upon another.

18. It is important, as will appear further on,<sup>3</sup> to understand the ground upon which privilege as permission rests; but nothing more than the general ground itself Ground of privilege: motive of duty or interest. can be stated here. Privilege as mere permission must of course rest on terms; otherwise it would be 'absolute.' Upon what particular ground it rests in special cases or in special classes of torts, can only be shown when the special subject arises in the 'Specific Torts' following this General Part. The first class of cases of privilege, 'by the party,' calls for little comment here. The ground of exemption is consent, which is often expressed by a maxim adopted from the Roman law, '*volenti non fit injuria*' — the man who consents to a wrong ('*injuria*') is barred of an action

<sup>1</sup> *Barnstable v. Thacher*, 3 Met. 239; post, p. 226.

<sup>2</sup> 'Justification' may be of legal right, as in the case of self-defence or defence of property, or it may be of mere permission.

<sup>3</sup> *Infra*, pp. 178, 179, and note 5.

for it.<sup>1</sup> Privilege 'by the law,' or privilege paramount, finds its origin either in duty or in interest,<sup>2</sup> and therefore, unlike legal right, rests upon motive. It is of course limited accordingly.

19. Duty as a ground of privilege may be official or quasi-official, or only moral, that is, of imperfect obligation. It

requires no explanation to show that one must be  
**Official duty.**

protected from the necessary consequences, however harmful, of discharging a duty which one is expected to perform. A policeman making report to his superior, an officer serving process, a fireman endeavoring to put out a fire, must be exempt from liability for everything done in the discharge of his duty. The law could not be administered upon any other footing in the first and second of these cases; and in the third it would be difficult to find firemen to protect our homes if the law were otherwise than it is.

<sup>1</sup> There is some limit to the validity of consent itself, but no very satisfactory ground has as yet been reached. Most authorities hold that agreements between shipper and common carrier to exempt the carrier from liability for the negligence of its servants are invalid, on the ground that the shipper is virtually in the power of the carrier; which is reasonable doctrine. But it is also held by most authorities that A's consent to B's committing a crime against him will not bar an action by A against B for damages sustained thereby. Thus either party to a fight may sue the other for assault and battery, notwithstanding consent. *Shay v. Thompson*, 59 Wis. 540; *Adams v. Waggoner*, 33 Ind. 531; *Bell v. Hansley*, 3 Jones, 131; *Commonwealth v. Collberg*, 119 Mass. 350. But see *Goldnamer v. O'Brien*, 33 S. W. Rep. 831 (Ky.), refusing a civil action for damages from attempted abortion, on the ground of assent. Violation of the criminal law is deemed so unlawful that consent to violate it is unlawful. Of course consent of the parties could not bar a prosecution by the State; but that is another thing. Suppose the State itself had consented to the crime?

Consent or want of consent has nothing to do with the case when the act or omission was lawful; and consent obtained by fraud is no consent in law. *Speight v. Olivier*, 2 Stark. 493, and *Dain v. Wycoff*, 7 N. Y. 191, 194, as to the last statement.

<sup>2</sup> *Hebditch v. MacIlwaine*, 1894, 2 Q. B. 54, C. A.; *Harrison v. Bush*, 5 El. & B. 341; *Jenoure v. Delmege*, 1891, A. C. 73 (Privy Council); *Gassett v. Gilbert*, 6 Gray, 94; *Joannes v. Bennett*, 5 Allen, 169.



20. That privilege may also arise from moral duty is not so obvious; still the fact rests in principle as well as upon authority. The case springs in essence from an instinctive desire for the preservation of the race, <sup>Moral duty.</sup> a desire akin to that of self-preservation and equally well-founded. It is not directly necessary to put the case upon the ground of political prudence, which sees in it the welfare of the State, though that plainly is a consequence of the first ground, and is the final test of duty. I may well enter my neighbor's premises to rescue his beast from the mire; much more may I enter to save human life; to hold me responsible for harm done in the reasonable discharge of such a duty would be to find the existence of a relation between my neighbor and me which would tend to anything but to bind us together into the organism which we call the State. Where moral (or official) duty shades into pure voluntarism, becoming impertinence, may often be a difficult question; but such considerations cannot avail against the existence of the immunity.

21. When it is said that privilege may grow out of interest, the word 'interest' must be taken in the sense, it seems, of legal right, or something in the nature of legal right. I may have a duty towards my neighbor as my neighbor, from an instinct of humanity; but I have no interest in him simply as my neighbor, except perhaps the shadowy interest in his welfare as one of the multitude of men composing the State, and so sharing with me its burdens. The interest required must at all events rise higher than desire or even anxiety for another's general welfare.<sup>1</sup>

### § 3. OF LEGAL DUTY.

22. Legal duty should be considered, not only because of its natural relation to legal right, but because of the course of the law. The law has had to look to infractions of right, to wrongs or breaches of duty, <sup>Tort on the side of duty.</sup> more directly than to rights, as the word tort itself im-

<sup>1</sup> See *Sheckell v. Jackson*, 10 Cush. 25; *Cases*, 178.

plies.<sup>1</sup> The law of torts has been worked out, not directly on the side of rights, not in terms even on the side of the violation of rights, but on the correlative side of duties.

23. What then is meant by legal duty? Something necessarily which one can perform. It must therefore spring from

Legal duty  
explained:  
knowledge or  
notice of  
danger.

facts which one observes or may observe, suggesting danger, — leading to harm as probable or in natural course. If danger is not observed or observable by a man of fair intelligence, as the law has well fixed the standard, there is ordinarily no duty; if it is so observed or observable, a duty ordinarily arises. Knowledge, or notice from the circumstances, of the existence of danger is therefore necessary to create a duty to avoid harm; except in peculiar cases. The matter may, then, be shortly put thus: When A is situated towards B so as to be able to see that harm is likely to come upon B by misconduct on his (A's) part, A must govern himself accordingly; he owes to B the duty to refrain: to violate the duty will make him liable in damages.

24. Now legal duty, like the converse or obverse legal right, is duty established by municipal law; the term 'legal' necessarily imports as much in both cases.

25. Duty in the foregoing remarks has been generalized in its broadest terms, for all kinds of tort. To attempt specific

Division of  
legal duties  
in tort.

statement, by undertaking to say what kind of conduct one should observe, or refrain from, would be useless. Duty in the law of torts is of varying kinds, and there is no specific factor common to these various phases; what would constitute specific duty in one case would not constitute it in another. Still, the various kinds of duty involved in the different torts are capable of being grouped into some three classes, upon a helpful basis.

<sup>1</sup> Latin *torquere*, *tortum*; to twist, a thing twisted, *distorted*, hence a wrong, — through Anglo-French; at first however only a colorless word.

26. In two of the three classes the breach of duty is committed by an act, in the third class by an act or an omission, in the sense in all of them of a thing done or omitted as the effect of a psychic or mental process, i. e. in consciousness, with purpose, as distinguished from mere reflex or automatic action; in other words, an act or omission in the sense of a thing intended, for every act or omission as a thing of consciousness is intended.<sup>1</sup> In the first two classes the act, and the legal result in the breach of duty and the infringement of right, are coincident, as of course must be the case where the breach of duty is fully accomplished. In the third class the breach of duty is not at first completed, but is provisional upon misfortune following. The infringement of right (if there be any) as a result *follows*, however soon, and is itself neither an act nor an omission. In other words, the wrongful act or the omission preceding, which creates the provisional breach of duty, is the only thing intended. What sooner or later follows, to wit, the infringement of right on the happening of the misfortune, is only an Event, though resulting in liability by reason of the misconduct which caused it.

27. In the first two classes the *effect* of the act, the breach of duty and coincident infringement of right, may or may not have been intended, but the act and the effect are usually simultaneous (though some effects may appear later); hence these are commonly said to be cases of intention. In the third class the effect is not intended; this accordingly is treated as the domain of negligence. But liability in the third class, as well as in the first and second, often though not always<sup>2</sup> arises from what was intended. The distinction really lies in the immediateness

<sup>1</sup> Hence to speak, in common legal phrase, of an 'intended act' is a pleonasm, and confusing; it is enough to say that a thing done in consciousness is an act. See Ziehen, *Physiological Psychology*, 29, London, 1892.

<sup>2</sup> As for instance where a trap door is by oversight or inadvertence left open or insecure.

or not of the effect of the misconduct as an infraction of right.<sup>1</sup>

28. Now, in what may be taken as the first of the three classes of breach of duty, a lawful act is done either by wrongful means,<sup>2</sup> which is always presumptively unlawful, or of malice, which in certain cases is presumptively unlawful; by 'means' being meant *measures* by which an act is done, by 'malice' a certain *state of mind* in which an act is done. In the second class the act done is in itself presumptively unlawful. In the third, what may, as we have seen, be called an Event has taken place, which event was caused by negligence and is for that reason presumptively unlawful.<sup>3</sup> Shortly, the three classes may be put thus:

**Divisions of duty described and named.**

1. Lawful acts done by wrongful means or of malice.
2. Unlawful acts.
3. Events (misfortune) caused by negligence.

29. This division of torts, covering as it does the whole ground, will be followed in this book, as Part I., Part II., and Part III.<sup>4</sup>

30. Speaking of the first class of cases, it matters not what means may be employed, so long as the means are wrongful; **Wrongful means.** such means will convert the lawful act either into an unlawful one or into one which the law will not uphold. Thus if a man is induced to sell his horse by fraud, or by coercion, threats, or intimidation, what in itself is a rightful act, buying and taking the horse, has by reason of the wrongful means employed become a tort.

<sup>1</sup> Of course the foregoing rejects the prevalent notion that a man intends the natural consequences of his conduct. On that point something will be said further on.

<sup>2</sup> Note that 'wrongful means' imports something short of a tort; otherwise the case would belong to the head Unlawful Acts. Ante, p. 5, note.

<sup>3</sup> In some States the plaintiff has to show that he was free from fault in the matter, to make a presumptive case.

<sup>4</sup> For details see Specific Torts, and the statement following that heading, post, — following this General Part.

31. Of the several means by which a lawful act may be converted into one not lawful, fraud alone will be specially considered. In regard to other wrongful means it must suffice to name them; but fraud requires particular examination. Part I. will therefore be reduced to a consideration of the Duty to refrain from Fraud and Malice. Of fraud it should here be said that, while taken in a narrow sense the term imports only a state of mind, in its broader sense it imports means employed in a transaction, such as misrepresentation.

Fraud.

32. It should be observed indeed that fraud, malice, and negligence are all of them terms of special legal import,—that they do not necessarily signify in the law what they import in popular speech. The law declares, on the appearance of certain external facts, that there is fraud, or malice, or negligence, whatever the popular meaning of the words. The law has its technical terms, and hence a dictionary of its own.

Fraud, malice, and negligence, as technical terms.

33. Fraud may be shortly disposed of, for the present purpose. The offence includes two classes of cases; one in which the person committing it is now dealing with the person upon whom it is committed, the other in which he is not. In the first class of cases the person defrauded is induced by the misrepresentations or other artifice of the wrongdoer to change his position to his hurt, whether by entering into new relations with the wrongdoer or in some other way. Here the two, personally or by agents, are face to face or are within touch by correspondence, and the wrongdoer holds out some deceptive inducement which is acted upon by the other. In the other class of cases the wrongdoer is seeking through some third person to circumvent the party to be wronged from enforcing his rights against him. The wrongdoer is putting his property out of his hands, for instance, to defraud the rights of his creditor or creditors. The first of the two classes is then deception; the second, circumvention without deception.

Division of fraud: present sense of term.



34. The first of the two leads to an action for damages ; the second does not in ordinary cases. The first alone is a tort ; we are not concerned with the second. Only a word more need be said. Fraud in the sense in which we are concerned with the term is one of the elements of a specific tort called Deceit ; in relation to which it has a definite, well-settled meaning. What that is will appear in the chapter relating to Deceit ; hence it need not be considered here.

35. Malice is one of the most perplexing terms of the law, especially in relation to civil liability.<sup>1</sup> It is continually used

Malice: popular sense ;  
motive: subjective, in  
law, but not  
as motive.

in different and conflicting senses. One thing however has always been agreed ; unlike fraud, it does not import means, though it may be very closely related to means, so closely that the case may falsely appear to be one of malice<sup>2</sup>

or of means.<sup>3</sup> Naturally and popularly malice imports motive, an evil motive or design, as of the very essence of the word. In law too the word is commonly used in a sense which makes it subjective, that is, a state of mind ; but that does not necessarily make it a motive. It does sometimes import motive in its relation to legal liability, as in the criminal law of murder, where the killing must be of malice aforethought, that is, as the precedents explain the expression, by an evil design or motive. So too in cases of punitive damages, a survival of the time when tort was not yet fully discriminated from crime, the 'actual malice' required for such redress appears to denote motive. But apart from the criminal law and its adjuncts, it seems that malice, even when called 'actual malice' or 'malice in the mind,' does not necessarily import motive. With the exception just named

<sup>1</sup> See the discussion in *Allen v. Flood*, 1898, A. C. 1, and 21 Am. Bar Assoc. Rep. 342, 345, 350, 351-355 (Krauthoff, *infra*).

<sup>2</sup> As where A does an act with intent to harm B, but in order to bring B to terms with him for some gainful purpose. The intent to harm is so dominant here that the case is likely to be looked upon as one of malice instead of means. See *Temperton v. Russell*, 1893, 1 Q. B. 715.

<sup>3</sup> As perhaps in the case of conspiracy. See post, p. 119.

it will probably suffice for a case of malice, wherever it is necessary to prove malice, that the act in question was done with knowledge that it would do harm, or with knowledge that it would be unjust, or in reckless or wanton disregard of another's rights.<sup>1</sup> To prosecute a man with knowledge that there is no just cause of prosecution would be an example. Here is malice in the mind, but not necessarily malice as an evil motive; one may well know that one's act will be mischievous without being actuated by the motive to inflict harm or to do injustice. A man may prosecute another without probable cause, in the hope of gaining a reward offered; a man may tell a wicked lie having as his sole motive the design to help a friend, indeed with regret that harm to any one should follow.

36. There is another sense too in which malice, as the law uses the term, may be subjective and yet still further removed from motive. To make A liable for interrupting a certain relation between B and C, as for instance that of master and servant, it is necessary to prove that A knew of the existence of the relation. Then, with such knowledge, interrupting the relation, he is said to have done the act maliciously; he has done it with malice in the mind because he has done it with knowledge of the relation. Here however it is plain that malice is or may be quite emptied of its natural meaning.

Interrupting  
relations, with  
notice, as  
malice.

37. In this last case malice as an entity is reduced to its lowest terms; more than that, it is an inappropriate and misleading name for doing certain acts with notice of certain relations, as a necessary condition merely to a breach of duty. From such cases it is but a step to cases in which the doing of certain acts is called malicious though no relation with others, of which there must be notice, exists, as in slander and libel.

38. The explanation of the use of the term 'malice' in

<sup>1</sup> *Savage v. Brewer*, 16 Pick. 453; *Gott v. Pulsifer*, 122 Mass. 235; *Zinn v. Rice*, 154 Mass. 1; *Sommer v. Wilt*, 4 Serg. & R. 19; *Allen v. Flood*, 1898, A. C. 1; *Wren v. Weild*, L. R. 4 Q. B. 734, 736.

these as well as in the foregoing cases is probably to be found in the historical connection, already referred to, of the criminal law with the law of torts. That is, the term was probably carried on from the criminal law, where it had an appropriate use, to the law of torts in the course of the emergence of that subject as a separate branch of law; where it was retained without sufficient regard to its inappropriateness to questions of civil liability.<sup>1</sup> Malice thus becomes, at last, a mere name of a legal conclusion, a name of nothing requiring proof; it is 'simply malice in law' or 'implied malice,' that is, it is a downright fiction.

**39.** To sum up: Malice, as an entity, in the eye of the law, like malice in popular speech, is a subjective fact. As such it may signify (1) motive exceptionally, or (2) recklessness, or knowledge that an act will be mischievous, or (3) nothing more than knowledge or notice of the existence of some special relation which is interrupted. In the first case malice makes a true head in the law; but its place is in criminal and quasi-criminal jurisprudence. There is no other place for malice in the sense of an evil *motive*, as a necessary element of liability. In the second case it is an old term in civil liability. In the

**Summary**  
division of  
malice as an  
element in  
liability.

<sup>1</sup> See a paper read before the American Bar Association at Saratoga, in August, 1898, by L. C. Krauthoff, on Malice as an Ingredient of a Civil Cause of Action. Reports of Am. Bar Assoc. xxi. 335. 'It seems clear,' says Mr. Krauthoff, 'that the pleaders of the olden days were largely moved to include the allegation of malice because of the use which had been made of it during the period when the civil remedy was supposed to be limited to criminal or quasi-criminal acts.' And he points to the connection of the allegation of homicide and murder with the allegation of malice in civil cases. Homicide is a killing without just cause or excuse; but to make a case of murder as distinguished from manslaughter, it is necessary to add that the killing was of malice aforethought. Now in many cases of tort, as in slander or libel, the wrongfulness of the act does not in reality require any statement that it was without just cause or excuse, much less to add that the act was done maliciously. The supposed analogy of the criminal law, incautiously adopted, is false and misleading.



third case, the word having completely lost its natural meaning has no just claim to a place in the law of malice. The facts which constitute it prove merely the existence of a duty by such as have the knowledge or the notice. There is nothing distinctive of malice in that; for, as we have seen, to create a duty there must in all ordinary cases be observable danger; if danger could not be seen or foreseen, if the relation in question was not known, there could be no duty. As for malice which is not an entity at all, but only a fiction, there is, a fortiori, no place for the troublesome term in any classification of subjects of the law.

40. It comes then to this, that malice in civil liability has a place in virtue of the legal extension of its popular meaning to cases of doing certain kinds of harm recklessly or with knowledge that such acts are harmful or unjust. In certain cases then malice in that sense makes an element in the cause of action. But it is still true that malice in the sense of an evil motive will also help to make a cause of action in the same cases; and that fact, which at first appears perplexing, calls for explanation.<sup>1</sup>

41. The explanation is probably to be found in the fact that the acts complained of in the cases referred to are privileged, as that term has already been explained. They are not true acts of legal right; they fall short so far that they are only permissions. The chief example is malicious prosecution, already referred to. The term is only a title; the wrong for which an action lies is a malicious prosecution begun without reasonable or probable cause. These facts (together with the termination of the prosecution) must be proved by the plaintiff. Now it is clear that no man has a legal right to prosecute another without reasonable or probable cause. A man *may* do so, as we have seen; no action can be maintained against him for so doing. But that is all there is of it; the person so prosecuting is merely exempt from

Effect of malice as motive explained: overturns permission, not right: malicious prosecution.

<sup>1</sup> The *evidence* will usually be objective, that is, external to the mind, as where excessive zeal in prosecuting is shown; but the evidence is offered to prove malice in the mind.

liability, — probably that men may not be discouraged from resorting to the courts to settle their disputes.

42. That the matter does not rise above the level of permission to that of legal right, may readily be shown. Suppose that by false and fraudulent representations, whether by the person intended to be prosecuted or another, a civil prosecution, without reasonable or probable cause, is put off until it is barred by the Statute of Limitations; could an action be maintained for the fraud? Clearly not, for as there was no ground for the intended prosecution there could be no damage; and no other kind of action would fare any better. The intended prosecutor therefore had no legal right to prosecute; indeed it would be absurd to speak of a legal right to prosecute where there is no cause of action, and none the less because it may have been honestly supposed that there was a well founded claim.

43. The explanation then of the fact that a plaintiff in a suit for malicious prosecution makes a case by proving (with other facts) that the prosecution was begun with malice as an evil motive, or with malice in any other subjective sense, is that proof of the kind merely overturns a permission or privilege. The permission or privilege rests in all cases, as we have seen, on the motive of interest or of duty, — in this case that the prosecution is brought with design to protect a proper interest of the prosecutor, or in the discharge of duty. If then the design was to harm the party prosecuted, in other words if the suit was brought with an evil motive towards him, it is not within the permission or privilege. And clearly there could be no privilege of the kind in question when the prosecution was begun in reckless or wanton disregard of the defendant's rights; the privilege must have been acted upon reasonably and in good faith.<sup>1</sup>

44. The case therefore is not one in which legal right, or, to use the more common term, a rightful act, is converted into a legal wrong or a wrongful act by proof that the right was exercised with an evil motive; and the same may be said of malice in any other purely subjective form.

<sup>1</sup> See post, pp. 178, 179.

45. Slander of title, so-called, an action for false and malicious disparagement of property, is also a case in which the disparaging statements are simply permitted or privileged.<sup>1</sup> A *may* falsely declare that B has Same; slander of title. no title to a certain piece of land claimed by B, or make other false statements concerning B's property, real or personal; no action could be maintained against him for the statements, though B suffered damage by them, any more than if in the same sort of case A had brought suit to recover the land. But that is not because A had a legal right to do such a thing; the law simply *permits* him. He could not maintain a suit against one who, by using means of a wrongful nature, prevented him from doing the thing, as by tearing up scattered notices or hand-bills making the false statements. But A is permitted to make the false statements unless B shows that he made them maliciously (to his damage). The malice however would be shown by proof that A knew the statements to be false or made them in reckless disregard of B's rights;<sup>2</sup> that would overthrow the permission. Belief by A, on the other hand, in the truth of the statements, would be a defence if a *prima facie* case were made against him; and it seems to follow that malice in the sense of motive would be irrelevant to such a defence, whatever might be said of it if offered in evidence at the outset to make a *prima facie* cause of action.

46. There is nothing then in either of the subjects considered, from which it can be inferred that malice, in the sense

<sup>1</sup> Wren *v.* Weild, L. R. 4 Q. B. 730; Halsey *v.* Brotherhood, 19 Ch. D. 386; Gott *v.* Pulsifer, 122 Mass. 235, 238. But it should be noticed that the privilege in slander of title and in malicious prosecution is not the substantive privilege (set up in pleading) of slander and libel. It is not brought out except by inference in the pleadings or evidence. The language of the cases should not be misunderstood. In slander and libel, privilege is set up after the plaintiff has made a *prima facie* case; in slander of title the plaintiff has to overturn, in the first instance, what we have in the text spoken of as privilege, — which is privilege, not in the technical sense, but only in the sense that false words disparaging property are *permitted* if they were not malicious.

<sup>2</sup> Gott *v.* Pulsifer and Wren *v.* Weild, *supra*.

of motive, can overturn legal right, so as to give to motive a place in the classification of civil wrongs. In **Same: slander and libel.** slander and libel, malice lies still further afield; it has nothing whatever to do as an entity, in any sense, with making a *prima facie* case. The plaintiff here does not have to overturn any privilege in advance; it is only when the defendant has set up a privilege and given evidence in support of the same that the plaintiff has anything to do but to prove the publication. Then, by proving malice, he cuts away the foundation of the alleged privilege; and all that he need prove in the way of malice is that the defendant published the charge knowing that it was false,<sup>1</sup> or in reckless disregard of rights.<sup>2</sup> Fraud then in its more familiar aspect in tort, and even negligence, are to a certain extent interchangeable terms with malice, though malice, in the sense of motive, is not interchangeable with them. 'Nullum simile est idem.'

47. There is, finally, little authority on the common law that malice, in any merely subjective sense, in acts otherwise done of legal right, is entitled to a place in the classification of civil wrongs, and the contrary **Conclusion as to subjective malice.** may be laid down as far more generally accepted doctrine;<sup>3</sup> though some authorities, accepting the general

<sup>1</sup> *Bodwell v. Osgood*, 3 Pick. 379. See *Wren v. Weild*, L. R. 4 Q. B. 734, 736, *Blackburn, J.*; *Green v. Button*, 2 Crompt. M. & R. 707; which were cases of slander of title.

<sup>2</sup> *Gott v. Pulsifer*, 122 Mass. 235, slander of title.

<sup>3</sup> The following, among many cases, may be mentioned: *Allon v. Flood*, 1898, A. C. 1; *Bradford v. Pickles*, 1895, A. C. 587, affirming 1895, 1 Ch. 145; *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25 (that the motive 'of benefiting the defendant at the expense of the plaintiff' is not malicious or unlawful, overruling on that point *Bowen v. Hall*, 6 Q. B. Div. 333, 338, Lord Esher); *Chasemore v. Richards*, 7 H. L. Cas. 349, 388; *Heald v. Carey*, 11 C. B. 977, 993; *Stevenson v. Newnham*, 13 C. B. 285, 297; *Paine v. Chandler*, 134 N. Y. 385, 390; *Frazier v. Brown*, 12 Ohio St. 294; *Boyson v. Thorn*, 98 Calif. 578; *Payne v. Western R. Co.*, 81 Tenn. 507; *Chatfield v. Wilson*, 28 Vt. 49; *Ileywood v. Tillson*, 75 Maine, 225; *Glencoe Land Co. v. Hudson Co.*, 138 Mo. 439, 445; *Anderson v. Public Schools*, 122 Mo. 61; *Kelly v. Chicago Ry. Co.*, 93 Iowa, 436, 452; *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223, 233; *Jenkins v. Fowler*, 24 Penn. St. 308; *Rideout v. Knox*, 148 Mass. 368, 372; *Rice*

doctrine, hold that malicious damage is actionable unless justified by competition or other lawful cause.<sup>1</sup> Conversely, it is equally true that an act which is a wrong or wrongful cannot be proved to have been done as of a right or rightfully by showing that it was done from a good motive; and so of omissions or conduct of whatever kind.<sup>2</sup> There has never been any question of this converse doctrine.

48. So much for Part I.

49. In Part II., breach of duty by Unlawful Acts, we come to a class of cases in which, though there is often a manifest intention on the part of the defendant to do the very thing for which he has been sued, the law ordinarily takes no account of his motive or state

Means, malice, and negligence unnecessary.

*v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11. But see *Wheatley v. Baugh*, 25 Penn. St. 528, 533; *Swett v. Cutts*, 50 N. H. 439; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Graham v. St. Charles R. Co.*, 27 L. R. A. 416 (La. under the Roman law). On interference with one's occupation or established business, as an exception, see post, pp. 120-123.

*Allen v. Flood*, supra, is the most important case on the subject. The House of Lords there overrules in effect *Temperton v. Russell*, 1893, 1 Q. B. 715, C. A., Cases, 109, reaffirms *Mogul Steamship Co. v. McGregor*, ut supra, and accordingly reverses *Flood v. Jackson*, 1895, 1 Q. B. 21. The case (*Allen v. Flood*) was twice argued in the House of Lords, ten other judges being called in on the second argument for advice. Against the advice of a majority of those judges the House of Lords held the plaintiffs not entitled to recover, though their own judgment was not unanimous. But the decision has all the force of an Act of Parliament; only Parliament can change it. *London Tramways Co. v. London County Council*, 1898, A. C. 375. In *Plant v. Woods*, 57 N. E. Rep. 1011 (Mass.), the court declines to follow the doctrine of *Allen v. Flood*; though on the facts in *Plant v. Woods* (there were threats of violence and intimidation) the two cases are not in conflict.

The Roman law took cognizance of malice as a motive, at least in regard to the use of land; and so does the modern Civil or Roman law. Digest, 39, 3, 1, §§ 12-17; Bigelow's L. C. Torts, 515, 516, 525; *Graham v. St. Charles R. Co.*, 27 L. R. A. 416 (La.). The New Hampshire cases, supra, appear to be in accord with the Roman law.

Malice in relation to particular torts will be considered as the torts are reached, in Parts I. and II.

<sup>1</sup> *Walker v. Cronin*, 107 Mass. 555; Cases, 102; *Plant v. Woods*, 57 N. E. Rep. 1011 (Mass.). Contra, *Allen v. Flood*, 1898, A. C. 1, 100, 138, 139.

<sup>2</sup> *Bradford v. Pickles*, 1895, A. C. 587, 594, 598; *Hooper v. Truscott*, 2 Bing. N. C. 457.



of mind, supposed or actual, or of the means employed, so far as the right of action is concerned. The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question, e. g. by fraud or in malice, though it often happens that one or other of these things is present. Nor is negligence, or the want of negligence, any necessary part of the case.

50. Here then is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have caused loss) is unlawful and redressible as a tort. The cases in which this is true are, speaking generally, cases of procuring breach of contract, enticing away and seduction,<sup>1</sup> slander and libel, violence apparently about to be committed,<sup>2</sup> or actually committed, upon one's person,<sup>3</sup> restraint of liberty,<sup>4</sup> interfering in one way or another with the possession,<sup>5</sup> ownership,<sup>6</sup> or enjoyment<sup>7</sup> of property, and failing to keep safely dangerous animals and dangerous things; and perhaps other cases.

51. We come now to Part III. From regarding, first, a mental attitude of the defendant, and, secondly, disregarding the existence or non-existence of such an attitude, the law now passes over to cases in which it regards, as an essential fact, what at first looks like a negative mental attitude. In the class of cases now reached, the law takes account of the fact that the defendant has not directed proper attention to danger attending some act or omission of his, or, if he has, that he has not conducted himself as he ought to have done in the situation. He has failed, e. g., to exercise due care; and the failure, assuming damage to have followed, consti-

<sup>1</sup> These two cases are cases of malice only in the sense of doing the act with notice of a special relation; which amounts only to showing a duty. See ante, p. 19.

<sup>2</sup> Assault.

<sup>3</sup> Battery.

<sup>4</sup> False imprisonment.

<sup>5</sup> Trespass to lands or goods.

<sup>6</sup> Conversion, 'trover' in the old law, a wrong relating to goods.

<sup>7</sup> E. g. nuisance.

tutes a tort. This phase of the breach of duty is the domain of negligence.<sup>1</sup>

*2nd lecture to 62*

52. The net result may then be shortly put as follows: Looking to one class of cases, a tort consists in a breach of duty committed by wrongful means, such as fraud, or of malice. Looking to a second class, **Final result.** a tort consists in a breach of duty absolute, regardless of wrongful means, malice, or negligence. Looking to a third class, a tort consists in a breach of duty committed by negligence.

53. Further, it must be observed that, whatever the duty, it must be a duty to a person complaining of the breach of it. A may have been guilty of conduct which is a breach of his duty to B, but not of his duty to C, **Duty to whom.** however much C may have suffered by reason of it. Or it may be a case in which A might have owed a duty to C but for the fact that C has relieved him of it. And it is permissible for one man to exempt another from his duty to him in a particular case when the act or the omission is not a violation of the criminal law, as in the case of parties agreeing to fight, or when the party exempting is not actually or virtually in the power of the party to be exempted, as in the case of shipper and carrier.<sup>2</sup>

<sup>1</sup> The law does not, in point of fact, stop to consider the actual state of mind of the defendant as a ground of liability in actions for negligence; the text only says that negligence 'at first looks like a negative mental attitude.' It is believed however, and it may be helpful to notice, that there is always in fact, to some extent, a negative or passive state of mind in cases of negligence; the mind has not been duly aroused to the danger, or if the defendant is sensible of the situation, he has not duly exerted his will to avoid harm. The very etymology of 'negligence' is instructive, as far as it goes. 'Neglegere' = 'neglegere;' *not* to choose, not to exercise the particular mental faculties. But the test is applied to the manifestation; the question is, not what was the defendant's state of mind, but what did he do or omit?

<sup>2</sup> Whether a common carrier can by contract exempt himself from liability for negligence is not agreed, but in this country the weight of authority is against any such power. Ante, p. 10, note.

54. The duty in question, as we have seen, is established by municipal law. This will serve to distinguish tort from contract; for in contract the duty is commonly fixed by the parties, in the terms of the agreement. But that is not always the case; it happens not infrequently that the parties to a contract leave terms to be supplied by the evidence of custom or by the law itself. In such cases a violation of the term so to be supplied might make a case of tort or of breach of contract, at the election of the injured party; the duty being fixed by law, or, what would come to much the same thing, by custom, the duty would be paramount, and hence the breach could be treated as a tort. Thus, if a common carrier at Chicago were to contract with A to deliver at New York wheat put into the carrier's hands, and fail to do so, he would be presumptively liable to A, as for a tort, or for breach of contract, at A's election.

55. Breach of an implied term of a contract may then, it seems, be treated as constituting a tort whenever the term is supplied by law or by custom; but that is not a matter of much importance in ordinary cases; the question is only one of the preferable remedy. Still, it is to be remembered that in theory the law of torts overlaps that of contract at the place indicated.

56. It is not to be inferred that there cannot be a tort in respect of the breach of a contract the terms of which are all fully expressed. If the contract contain a false warranty, it is broken in the breach of the warranty; and breach of an affirmative warranty,<sup>1</sup> fraudulently made, may be treated as a tort. So too, what is of much importance, a contract founded upon a false and fraudulent representation, though not amounting to a warranty, may be repudiated, and an action for tort maintained; or the contract may be treated by the injured party as binding, and an action for tort brought to recover damages for the loss caused by getting him into the contract. The explanation is, that the breach of duty

<sup>1</sup> A warranty affirming a fact, as distinguished from one promising something.



sued upon is not in reality a term, express or implied, of the contract; the duty violated is fixed by law, — a duty not to defraud. In this view then the law of tort still further overlaps that of contract.<sup>1</sup>

#### § 4. OF DAMAGE.

57. We have seen that tort gives rise to a suit for damages. But that does not necessarily imply that the plaintiff must have sustained some loss or detriment. Like A technical term. 'fraud,' 'damage' is a technical term. There are many cases in which the defendant would not be allowed to show that the plaintiff had not suffered a pennyworth. On the other hand, there are many cases in which the plaintiff cannot recover judgment without proving that the act or the omission of the defendant caused a loss to him.

58. Loss in the sense of actual harm or prejudice is called in the law special damage, though the term 'special damage' is sometimes used in the sense of a particular kind of loss.<sup>2</sup> The contrasting term is implied or legal damage; this imports a mere violation of what Special damage: when not necessary. may be called an absolute legal right. Speaking broadly the cases in which it is not necessary to prove special damage in an action for tort are cases in which the act done is manifestly dangerous, so much so that instinct calls at once for redress and would take it but for the law. Rights of life, liberty, property, and reputation furnish the subjects of such redress. Attempts upon life, whether to take life or not; restraint of liberty; interfering with property; assailing one's good name; such acts call for redress without regard to the question of loss. One would instinctively seek redress in such cases; and the law only sanctions, what it must in some

<sup>1</sup> In regard to the case of warranty, if what is said supra is not understood, it should be observed that warranty in itself, where it consists in the affirmation of a fact, is a contract only in a peculiar sense; and in general it is only false warranties of that affirmative kind that are treated as torts. As a statement of fact, a warranty is naturally a representation; but the law turns it artificially into a contract.

<sup>2</sup> *Ratcliffe v. Evans*, 1892, 2 Q. B. 524, 528, Bowen, L. J.

way always sanction, instinct. If one had to endure acts of the kind not causing loss, one would be constantly at the mercy of bullies and lawless men. For the specific cases to which these remarks apply, the 'Statement of the duty' at the head of the several chapters should be consulted, where the presence or absence of the word 'damage,' there used in the sense of loss or special damage, will give the desired information.

59. To constitute damage in the sense of loss or special damage, it appears, by the current of authority, to be necessary that something more than mental suffering, or a shock to the nerves, alone without 'impact'<sup>1</sup> or even *followed* by sickness, should have been caused.<sup>2</sup> A workman on a house might negligently let a stick fall at my feet, as I was passing along the street, and if, though startled, I was not hit, the workman probably would not be liable for the act;<sup>3</sup> but if he threw the stick at me, with the same result, he would be liable, for passion would instinctively be aroused to redress.<sup>4</sup> But rather inconsistently, mental distress may be considered as an element in damages in any case where a right of action is shown regardless of such distress.<sup>5</sup>

60. Finally, the fact that a tort is redressible in damages serves to distinguish the wrong from a crime; which is re-

<sup>1</sup> *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222; *Spade v. Lynn R. Co.*, 168 Mass. 285; s. c. 172 Mass. 488; *Texarkana Ry. Co. v. Anderson*, 67 Ark. 123. But see *Lyne v. Western Union Tel. Co.*, 123 N. C. 129; *Telegraph Co. v. Mellon*, 96 Tenn. 66. The doctrine rests partly on the ground of the difficulty of getting at the truth, partly on the ground that mental suffering is very much a matter of individual temperament and susceptibility, in other words that the effect is not sufficiently uniform to make it natural and probable — it is 'remote.'

<sup>2</sup> *Terwilliger v. Wands*, 17 N. Y. 54, 63; *Wilson v. Goit*, id. 442.

<sup>3</sup> Compare *Victorian Rys. Comm'rs v. Coultas*, *supra*, fright upon danger of collision with a railway train.

<sup>4</sup> Another reason has well been given, that an intended wrong is more likely to do harm than one not intended. See *White v. Duggan*, 140 Mass. 18, 20.

<sup>5</sup> See *Warren v. Boston & M. R.*, 163 Mass. 484, 487; *Harvard Law Review*, January, 1894, p. 304; *Spade v. Lynn R. Co.*, 168 Mass. 285, 290; s. c. 172 Mass. 488, 490.

dressed by prosecution on behalf of the public for the purpose of punishing the accused, by imprisonment, fine, or forfeiture. But most crimes attended with loss may also be treated as torts. Homicide is an exception, apart from cases falling within statute. It will be seen then that the law of torts, which we have found overlapping the law of contracts on one side, overlaps on the other the criminal law. But the greater part by far of the domain of tort lies between the two extremes.

**Tort distinguished from crime.**

61. In explanation of the examples given throughout the general text following, it is to be observed that when a particular act or omission under consideration is said to be a 'breach of duty,' or of 'legal duty,' or of the 'duty under consideration,' it is assumed that other elements of liability, if there be such, are present. Further 'breach of duty' or the like implies a right of action in damages. And the term 'damage,' standing alone, is generally used in the text, as well as in the 'Statement of the duty,' in the sense of 'special damage,' actual loss. The 'Statement of the duty,' it may be added, is intended to suggest a *prima facie* case.

**Explanation of examples.**

## § 5. DEFINITION OF TORT.

62. Having in mind what has been said in the preceding sections as constituting the substance of a tort, a definition of the term may now be given. To attempt a definition which would tell its own story on its face would be hopeless. Indeed no definition, helped out however much by explanation, can convey an adequate notion of the meaning of the word; nothing short of careful study of the specific torts of the law will answer, for there is no such thing as a typical tort, an actual tort, that is to say, which contains all the elements entering into the rest. One tort is as perfect as another; and each tort differs from the others in its legal constituents. But they all have this in common, that there must be a

**Definition must be taken with explanation.**

breach of duty paramount, or, as we shall now put it, established by municipal law; and they all lead to an action for damages. These facts must furnish our definition. Accordingly a tort may be said to be, *a breach of duty established by municipal law for which a suit for damages can be maintained*; or, conversely, *the infringement of a private right, or a public as a private right, established by municipal law.*

## § 6. OF PERSONAL RELATION, OR STATUS, ETC.

63. What has gone before relates to the law of torts in what may be called its primary manifestation, — in other words, between citizen and citizen as such. But that does not exhaust the subject; it remains to consider the subject as affected by the fact of a person's standing in some special relation to his fellows, or of being subject to some incapacity before the law, or of occupying some special relation to one who is the immediate wrongdoer. Thus a person sought to be held liable for a tort may at the time of the wrong alleged have been holding some post of state, such as a judicial position, or he may have been under some disqualification or incapacity, putting him below the level of a full citizen, as where he was insane or under age, or he may have been an employer of the person immediately guilty. Nothing yet set forth shows what the standing of such persons would be in an action against them for tort. How does the particular situation of a citizen affect the question of his liability?

64. In regard to persons holding under the State, executive, legislative, or judicial position, the answer is a simple one; the case is one ordinarily of absolute privilege, and might have been considered under the head of privilege except that it was thought best to confine the subject there to primary relations, or citizen and citizen, in accordance with the treatment of right. No action for damages can be maintained against a person for anything said or done, for example, in the discharge of judicial duty,

Special manifestation of duty.

Executive, legislative, and judicial positions.

except it be an action for false imprisonment; no action for fraud, for malice, for trespass (except imprisonment), for conversion, for negligence, or for anything else in consequence of judicial action; and so of things said or done by the executive or of a member of the legislature.

65. Because, apparently, of the tender regard which the courts have always felt constrained to show towards liberty, actions in certain cases are maintainable against magistrates who have caused the imprisonment of men without just process. This is not the place to consider what is necessary to make a case against a judge on such grounds; to point out the liability is all that is now called for. The subject will be considered in its proper place.<sup>1</sup>

66. The ground of the immunity of the executive,<sup>2</sup> of legislators, and of judges is plain. The places occupied by such persons are the great departments of the State, and the State could not carry on its functions if those set over its departments could be haled before the courts at the suit of every person aggrieved by their action.<sup>3</sup>

67. In regard to competency or capacity, it is to be observed that the breach of duty may be committed by any one having natural capacity.<sup>4</sup> The law of torts affords a strong contrast in this particular both to the law of contracts and to the criminal law. Liability in contract depends, it is true, upon capacity to contract; but want of such capacity may be either natural or artificial (legal). One must be of sound mind and at least twenty-one years of age to bind one's self by contract.<sup>5</sup> Liability under the criminal law depends also upon the existence of

Capacity:  
criminal law  
fraud, malice,  
and negli-  
gence.

<sup>1</sup> Chapter ix.

<sup>2</sup> *Spalding v. Vilas*, 161 U. S. 483. See *Chatterton v. Secretary of State*, 1895; 2 Q. B. 189.

<sup>3</sup> *Id.*

<sup>4</sup> The law in regard to married women has been so much and so variously changed by statute in the different States that no attempt will be made to consider it.

<sup>5</sup> Contracts for necessities make an exception.



capacity to commit crime; but want of this too may be natural or artificial. A person must be of sound mind and at least seven years of age to be subject to punishment under the criminal law.

68. There may be difficulty sometimes in applying the rule of natural capacity, but the difficulty can seldom arise except in cases requiring proof of fraud, malice, or negligence, and then, generally speaking, only in suits against infants. Where the doing of the act creates, of itself, liability, — that is, where there is a breach of the absolute duty, — a defence of incapacity would be manifestly contrary to the fact, and could not, it seems, be allowed. The fact that the person was of unsound mind or a child of tender years would not be material. It would be enough that the act was done of the will, uncompelled.<sup>1</sup>

69. Cases requiring proof of fraud, malice, or negligence would perhaps create no difficulty where the defendant was a person so unsound of mind as not to be accountable to the criminal law; an action of tort could hardly be maintained. A madman may, indeed, be guilty of fraud or malice in some sense (cunning, it is well known, is a common trait of the insane), but not in the sense in which it would be necessary to create liability, as e. g. in an action for deceit or for malicious prosecution.<sup>2</sup> And clearly a madman cannot exercise diligence.<sup>3</sup> A person sane enough to be accountable to the criminal law would probably be liable for any kind of tort.

<sup>1</sup> Is a madman, or rather is a madman's estate, liable in damages for the consequences of an act otherwise wrongful which was done, though intentionally, in an uncontrollable frenzy? Or suppose that A threatens to kill B unless B will trespass upon C's land, and B does the act; will it affect the case that B is an infant, insane, or idiotic? The first of these questions, or an approach to it, is thus raised and answered in the Roman law: *Et ideo querimus, si furiosus damnum dederit, an legis Aquiliæ actio sit? Et Pegasus negavit: quæ enim in eo culpa sit cum suæ mentis non sit? Et hoc est verissimum.* Dig. 9, 2, 5, § 2.

<sup>2</sup> *Comp. Emmens v. Pottle*, 16 Q. B. Div. 354, 356, Lord Esher.

<sup>3</sup> Whoever is incapable of *diligentia* cannot be charged with *negligentia*. Wharton, *Negligence*, § 87, on the Roman law. See *Harvard Law Review*, May, 1896, p. 65.

70. Infancy is more likely to give occasion for serious difficulty. An infant of sound mind twenty years of age, or much less, is liable for any tort for which an adult might be sued; an infant of five years could seldom be liable in damages for negligence, and of course would never be sued for torts requiring proof of fraud or malice. But within these extremes, there is a region of uncertainty, in which the courts, if called upon to act, must act according to the best light they may have in each particular case; the question of capacity being a question of fact.<sup>1</sup>

71. There is a difficulty of another kind touching the liability of infants and of persons of unsound mind, namely, where what would be a tort in other cases, as for example a fraudulent representation, is the inducement to a contract. But the rule in regard to such cases is that there can be no liability in tort if to enforce an action of the kind would virtually fix upon the incompetent party liability for breach of contract.<sup>2</sup> The case is or may be quite different where the tort follows, but is not caused by the contract; to enforce an action for tort in such a case would not be to enforce a contract, as for example to compel an infant to make good the loss of a horse which he has borrowed and then directly abused and killed.<sup>3</sup>

72. It should not be supposed to follow that persons under disability can, in virtue of their disability, retain whatever they may have become possessed of by wrongful conduct. The meaning of the law is only that no liability actually or virtually by way of contract can be created against such

<sup>1</sup> Of the liability of infants for injuria (tort) generally the Roman jurist Labeo said, 'teneri et Aquilia eum,' to which is added, 'et hoc puto verum, si sit jam injuriæ capax.' Dig. 9, 2, 5, § 2. The contention sometimes maintained that infants are liable only for absolute torts like trespass or conversion, and not for torts like deceit, has not found much favor. See Pollock, Torts, 53, 2d ed.

<sup>2</sup> Baker v. Stone, 136 Mass. 405; Alvey v. Reed, 17 N. E. 265 (Ind.); Wieland v. Kobick, 110 Ill. 16; Conrad v. Lane, 26 Minn. 389; Fairhurst v. Liverpool Loan Assoc., 9 Ex. 422. But see Kilgore v. Jordan, 17 Tex. 341. These are cases of infancy.

<sup>3</sup> Burnard v. Haggis, 14 C. B. N. S. 45.

persons. Infants have been compelled to surrender premises obtained under lease by them, through fraudulent representations that they were of full age, upon the ground that an infant shall not take advantage of his own fraud to keep his ill-gotten booty. He must restore what he has obtained by fraud, if he has it and will not carry out his bargain.<sup>1</sup> But cases of this kind, not being actions for damages, do not fall within the scope of this book.

73. Allied to the class of cases of persons under disability, so far as right is concerned, are corporations. **Corporations.** These are fictitious persons, and when created by statute have no powers or rights but those conferred by the statute; and since statutes seldom if ever confer upon corporations all the powers or rights of citizens, it follows that corporations are more or less under disability. And formerly the fact that a corporation was a fictitious person was looked upon as a serious obstacle to holding such a body liable (except in the case of a corporation sole) for torts in which mental attitude has or seems to have place in a cause of action, and in very early times for torts of any kind;<sup>2</sup> which of course disregarded the fact that those composing the corporation were human beings, for they were not the corporation.

74. But this technical piece of rationalizing has given way, and it is now probably general doctrine that the fact that what would be a tort in the case of an individual was done or omitted by a corporation, makes no difference. That is, though not having all the rights of individuals, corporations must still respect the rights of individuals,—their duties are measured by the rights of those with whom they come

<sup>1</sup> *Lemprière v. Lange*, L. R. 12 Ch. 675.

<sup>2</sup> 'The difficulty felt in earlier times was one,' it is said, 'purely of process; not that a corporation was metaphysically incapable of doing wrong, but that it was not physically amenable to *capias* or *exigent*. 22 Ass. 100, pl. 67, and other authorities.' Pollock, *Torts*, 53, 2d ed., citing Serjeant Manning's note to *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452.



into contact. Thus a corporation committing torts by fraud or of malice<sup>1</sup> is liable for the same as clearly as for torts committed by negligence; a corporation is liable also for assault, false imprisonment, and probably for all kinds of torts.<sup>2</sup> An exception has been made by some courts in favor of charitable corporations, on the ground that where funds have been given to a body incorporated for such public purpose they should not be diverted to pay for damages for the torts of its agents or servants, where due care has been taken in selecting its men.<sup>3</sup>

75. It is obvious that disability in the way of immunity from liability for acts or omissions does not of itself involve diminution of rights; nothing but alienage or the commission of crime works abridgment of rights, so far as the subject of rights of action is concerned. All persons except criminals undergoing punishment, and aliens, whatever their incapacity to incur liability, may sue for tort; and the disability of

<sup>1</sup> See e. g. *Smith v. Land & House Corp.*, 28 Ch. Div. 7; *Cases 26* (deceit); *Cornford v. Carlton Bank*, 1900, 1 Q. B. 22; s. c. 1899, 1 Q. B. 392 (malicious prosecution); *Vance v. Erie Ry. Co.*, 32 N. J. 334 (the same); *Jordan v. Alabama R. Co.*, 74 Ala. 85 (the same); *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25; *Cases, 80* ('conspiracy'); *Fogg v. Boston & L. R. Co.*, 148 Mass. 513 (libel). In *Comerford v. West End Ry. Co.*, 164 Mass. 13, doubt is raised whether a corporation is liable for slander or libel by its servants or agents in the course of their employment, unless the act was authorized or adopted by the corporation. But it may be doubted whether this distinction is well taken. Cases denying any action for malicious prosecution have been overruled in this country by *Jordan v. Alabama R. Co.*, *supra*, *Boogher v. Life Association*, 75 Mo. 319, and by other cases. But see the remarks of Lord Bramwell in *Abrath v. Northeastern Ry. Co.*, 11 App. Cas. 247, 250, which were not followed in *Cornford v. Carlton Bank*, *supra*.

<sup>2</sup> As to *municipal* corporations see *Rhobidas v. Concord*, 47 Atl. Rep. 82 (N. H.).

<sup>3</sup> *Hearns v. Waterbury Hospital*, 33 Atl. Rep. 595 (Conn.); *Downs v. Harper Hospital*, 101 Mich. 555; *Heriot's Hospital v. Ross*, 12 Clark & F. 507, 513, dictum of Lord Cottenham. But see *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93; *Glavin v. Rhode Island Hospital*, 12 R. I. 411; *McDonald v. Massachusetts Hospital*, 120 Mass. 432. It will be seen that the English courts have abandoned the doctrine.

criminals and of aliens to sue has nearly become a thing of the past under enlightened legislation.

76. The next personal relation to be considered is master and servant, where a tort has been committed by or through the servant. By the term 'servant' appears to **Master and servant.** be meant one who, being strictly subordinate to and dependent upon the will of his employer within the terms of the employment, does not make, or rather is not engaged to make, contracts for his employer.<sup>1</sup> Such a person, when engaged in a lawful employment, and acting as a servant and at the same time not 'wilfully' in the sense of purposely or knowingly participating with his employer in wrongdoing, is not liable for the consequences of his acts or omissions as torts. 'Respondeat superior.'

77. There is no anomaly in this, for it may well be that the wrongfulness of what has been done or omitted depends upon knowledge or means of knowledge possessed only by the master. In such a case there being on the part of the servant nothing to suggest harm or danger, he does not see that any one's rights are being or are likely to be infringed, and hence he cannot be guilty of any breach of duty. The contrary will of course be true where the servant, though acting under command, understands, or ought from facts known to him to understand, that the rights of others will be infringed, and yet executes his orders.

78. As regards the liability of the servant then, the case is normal, falling in with the general doctrine of rights and duties. It is very different as regards the liability of the master; his liability lies outside anything that has gone

<sup>1</sup> When one is employed to make contracts for the employer, thus bringing about a new relation, the case deserves another name, and has it in 'agency.' See Huffcut, Agency, § 4; Harvard Law Review, April, 1896, p. 512. A person may be my servant for general purposes, as for instance my coachman, and yet directly my agent, as when I send him to purchase new furnishings for my carriage or to have the carriage painted; he would still be *called* a servant, though exercising exceptionally the function of an agent.

before in this consideration of the law of torts. The observability of harm or danger, from facts at hand, or facts one ought to know, is, as we have seen, the basis of duty; but a master may be liable for the torts of his servant, though to *him* (the master) there was no ground for apprehending harm; he may have been a thousand miles away — enough that the servant's act or omission was in the course and within the scope of his employment, even though contrary to the master's own orders.

79. Many attempts to account for this doctrine of the law have been made since it became established, and some while it was in process of acceptance. Sometimes it has been said that there is an implied command for every act of the servant in the service of his master;<sup>1</sup> but that is only another way of saying that the act is in law authorized, which is true, but is no explanation of the case. It has also been said that the master has put the servant in the master's place to do the master's work; or to do the class of things embraced in the particular case.<sup>2</sup> But this also, if in less degree, is unsatisfactory; and so of most other reasons given in the books. The one ground which cannot be disputed, and probably is the true one, is that the judges have on the whole concluded that, in the interests of the State, or on what is often called public policy, it is best that the master should be liable.

80. But the master is liable only when the servant was at the time acting within the scope of his employment, which appears to mean acting for the master;<sup>3</sup> and as has already been intimated, a servant may be acting for his master, so as to fix upon the master liability for tort, though the servant was at the time violating his master's plain orders. Thus I may send my servant with horse and wagon on an errand to a certain town, and tell him that he must not go by a certain road because it is in a dangerous condition; but if in the

<sup>1</sup> Blackstone, i. 417.

<sup>2</sup> *Bayley v. Manchester R. Co.*, L. R. 7 C. P. 415; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *British Banking Co. v. Charnwood Ry. Co.*, 18 Q. B. Div. 714, 718; *Bigelow, Fraud*, i. 228, note.

<sup>3</sup> *British Banking Co. v. Charnwood Ry. Co.*, 18 Q. B. Div. 714 (agency).

course of the errand he goes by that road, and while in it injures some one by negligent or even by wilfully bad driving, I am liable.<sup>1</sup>

81. There was some question formerly whether a master could be held for what were called 'wilful' torts by his servant, though committed on behalf of the master; but the doubt has disappeared, and the master would now be held liable.<sup>2</sup> Thus, if a servant of a railway company should commit an assault upon a passenger in a train, in the course of his employment and not in consequence of something outside of the same, the railway company would be liable.<sup>3</sup>

82. The moment the servant ceases to act for his master, though still remaining in the service, the master's liability ceases, and does not arise again until the servant begins once more to act for him.<sup>4</sup> Thus, if after starting out upon an errand for his master, the servant should turn aside for purposes of his own or another's, as if he should go off to make a purchase for himself or for some friend, or if he should go to see a game of ball, the master could not be held for torts committed by him while so doing.<sup>5</sup>

83. The doctrine which imposes liability upon the master is a general one, applying as well to cases of slander and libel,<sup>6</sup> malicious prosecution,<sup>7</sup> and other torts,<sup>8</sup> as to cases of negligence and trespass.

<sup>1</sup> *Howe v. Newmarch*, 12 Allen, 49.

<sup>2</sup> *Id.*

<sup>3</sup> See *McGilvray v. West End St. Ry.*, 164 Mass. 122; *Daniel v. Peterborough Ry. Co.*, 23 S. E. Rep. 327 (N. C.); *Lynch v. Metropolitan Ry. Co.*, 90 N. Y. 77; *Pennsylvania R. Co. v. Vandiver*, 42 Penn. St. 365; *Bayley v. Manchester R. Co.*, L. R. 7 C. P. 415.

<sup>4</sup> See *Rayner v. Mitchell*, 2 C. P. D. 357, as to the servant's re-entering upon his service.

<sup>5</sup> See *Storey v. Ashton*, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, 2 C. P. D. 357; *Mitchell v. Crasweller*, 13 C. B. 237.

<sup>6</sup> *Smith v. Utley*, 65 N. W. Rep. 744; *Dunn v. Hall*, 1 Ind. 344; *Huff v. Bennett*, 4 Sandf. 120; *Davison v. Duncan*, 7 El. & B. 229. A receiver in chancery is not exempt from liability. *Martin v. Van Schaick*, 4 Paige, 479.

<sup>7</sup> *Vance v. Erie Ry. Co.*, 32 N. J. 334; ante, p. 35.

<sup>8</sup> *Smith v. Land & House Corp.*, 28 Ch. D. 7; *Cases*, 26 (Deceit).

84. Closely allied to master and servant, for the purposes under consideration, is the relation of principal and agent. It is sometimes put as a distinction between the two relations, that a servant can exercise no independent discretion, but is subject at all times to the control and direction of his master, while an agent acts largely upon his own discretion; but the distinction will not bear examination. So far as there is a difference in the matter of discretion between the two relations, it is a difference of kind, not a difference between the absence and the existence of discretion. A servant must frequently exercise a very wide and important discretion, especially when his master is beyond reach. A servant employed to drive a stage-coach or an electric car has the care of human lives committed to him, and their safety will depend very much upon the exercise of his own discretion;<sup>1</sup> and on the other hand even the simplest kind of service involves the exercise of discretion, otherwise a stupid servant would be as useful as a bright one. The master cannot be present all the time to direct his servant.

85. The real difference is in the kind of discretion to be exercised; an agent, while, like a servant, subordinate to and not independent of his employer, is employed to make contracts for his principal. That makes a fundamental difference; but it does not bring about any special result in regard to the principal's liability for his agent's torts. The liability of a principal is the same as that of a master, whatever the tort. And the limits of liability are the same; a principal, like a master, is liable for his agent's torts only when his agent is acting for him, not when the agent is acting for himself, even though doing something which he might have done for his principal.<sup>2</sup>

<sup>1</sup> 'That the proper management of the boilers and machinery of a steamboat requires skill must be admitted. Indeed, by the Act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it.' *New World v. King*, 16 How. 469.

<sup>2</sup> *British Banking Co. v. Charnwood Ry. Co.*, 18 Q. B. D. 714.



86. Some courts make a single exception to the general rule by which a principal is held liable for the torts of his agent committed on his behalf; they refuse to hold an innocent principal liable for the fraudulent misrepresentations of his agent, which as a matter of fact were not authorized, though they were made in the course and within the scope of the agent's employment.<sup>1</sup> This has been put upon the ground that the general rule imposing liability upon one who, morally speaking, is guiltless is exceptional and harsh. Such a rule it is declared should not be extended to a new class of cases not necessarily within it, except upon grounds of urgent public policy; and no such grounds are considered to exist. The tendency of the authorities however has been steadily against this view, and accordingly most of the courts, refusing to make any exception, hold the principal liable.<sup>2</sup> All would agree that if the principal derived a benefit from his agent's fraud, without offering to return it upon discovering the deception practised, he would be liable.

87. For the torts committed by one of two or more servants to the damage of a fellow servant, the master is not  
 Fellow ser- liable, unless statute makes him liable. Cases  
 vants. of the kind seldom arise except in negligence, and hence the rule is commonly justified in terms relating to negligence. The servant, in entering the service, assumes, legally speaking, the risk of everything which is incidental to the employment, and this is declared to include the negligence of a fellow servant.<sup>3</sup> But the exemption from liability

<sup>1</sup> *Kennedy v. McKay*, 43 N. J. 288; *Western Bank v. Addie*, L. R. 1 H. L. Sc. 145. See *Bigelow*, *Fraud*, i. 228. The principal is 'innocent' in the double sense of not in fact having authorized the representation, and not knowing or having reason to know that it was false.

<sup>2</sup> *Allerton v. Allerton*, 50 N. Y. 670; *Creig v. Ward*, 3 Keyes, 393; *Durst v. Burton*, 47 N. Y. 167; *Jeffrey v. Bigelow*, 13 Wend. 518; *White v. Sawyer*, 16 Gray, 586; *Fitzsimmons v. Joslin*, 21 Vt. 119; *Presby v. Parker*, 56 N. H. 409; *Lee v. Pearce*, 68 N. C. 76; *Hopkins v. Snedaker*, 71 Ill. 449; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259 (Ex. Ch.); *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; and other cases cited in *Bigelow*, *Fraud*, i. 227.

<sup>3</sup> *Post*, chap. xviii. § 11.

is not limited to cases of negligence; on the contrary the employer, whether a master or a principal, is not liable at common law for damage wrongfully done by one servant or agent to his fellow in the course of the business, whatever the nature of the tort, whether of negligence, fraud, malice, or anything else.

88. The doctrine that the servant assumes the risk of negligence on the part of his fellows is not then broad enough, even if it were not what it appears to be, an arbitrary doctrine, generally untrue in point of fact. It would be still less true to say that a servant assumes the risk of torts in general by his fellows. The truth appears to be that, without resorting to fiction, a servant stands in a different position towards his master from that of a stranger. This may be seen by supposing the case of a man's children, who in law are his servants, or of a man's domestic servants; the idea that one of these could sue the master for torts of another of them would be revolting. The case of non-domestic servants differs only in degree, and the degree of difference must be considerable to justify an alteration of the common law even in cases of negligence; much more so in other cases. Masters furnish the means of support for servants, and hence should not be liable to their servants unless *they* have done them wrong. The relation is beneficent towards the more dependent classes, and should not be discouraged.

89. The relation of servant or agent is one of strict dependence upon the authority of the employer; it is on that footing that the latter is liable. When the employment does not create dependence, when the person employed is, in the conduct of the employment, independent of the person engaging him, when in a word he is what is called in the books an 'independent contractor,' the employer is not liable for the torts of such contractor;<sup>1</sup> unless the mis-

Independent  
contractors.

<sup>1</sup> Hilliard v. Richardson, 3 Gray, 349; L. C. Torts, 636; Gorham v. Gross, 125 Mass. 232; Cuff v. Newark R. Co., 6 Vroom, 17; Brown v. Acerrington Cotton Co., 3 H. & C. 511; Hardaker v. Idle District Council, 1896, 1 Q. B. 335; post, chap. xviii. § 12.



conduct of the contractor was itself also a breach of duty owed by the employer, as where there was a vice in the very undertaking.<sup>1</sup> Thus if I enter into contract with a builder to erect a house for me, or to make over a factory into a house, he alone will be liable to others, until I resume control, for torts committed in the course of the work, notwithstanding the fact that the work is done for me.<sup>2</sup> And so in turn if he should employ an independent sub-contractor for part of the work, such as putting in the gas fittings, such sub-contractor, and not the chief contractor, much less the first employer, will be liable for torts committed in performing the sub-contract, until he turns over his work to the principal contractor.<sup>3</sup>

90. The qualifications to this doctrine, as has been indicated, are found in cases in which the employer owed some duty to others regardless of the 'independent contract,' which that contract does not relieve him of. Thus the owner of premises owes the duty to others not to maintain, or allow to be maintained, a nuisance upon his premises, and if in consequence of a contract with another a nuisance is created there, the owner will not escape liability because the person immediately guilty of causing it is an independent contractor.<sup>4</sup>

91. The same would be true if the thing authorized to be done by the contract were wholly illegal, or wholly without

<sup>1</sup> *Gorham v. Gross*, 125 Mass. 232; *Sturges v. Theological Education Soc.*, 130 Mass. 414; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 341, 352; *Penny v. Wimbledon District Council*, 1899, 2 Q. B. 72, C. A.; post, p. 380.

<sup>2</sup> *Hilliard v. Richardson*, supra.

<sup>3</sup> *Cuff v. Newark R. Co.*, supra; *Rapson v. Cubitt*, 9 M. & W. 710; *Overton v. Freeman*, 11 C. B. 867. See L. C. Torts, 657. 'In ascertaining who is liable for the act of a wrongdoer, you must look to the wrongdoer himself, or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable.' *Murray v. Currie*, L. R. 6 C. P. 24, 27, Willes, J.

<sup>4</sup> *Sturges v. Theological Education Soc.*, supra; *Harding v. Boston*, 163 Mass. 14; *Hardaker v. Idle District Council*, supra; *Hilliard v. Richardson*, supra.

the sanction of law, as if a town, having no authority to lay gas pipes through its roads, should contract with a person to lay such pipes, and some one should be injured by nuisance, trespass, or negligence on the part of that person, in the work.<sup>1</sup> And the like would be true of cases in which a corporation, municipal or not, having special duties towards the general public, as in the case of a railroad company, should employ an independent contractor to do work for it in premises which the company was bound to have in fit condition for business of the public; in such a case the railroad company could not delegate or otherwise get rid of its own duty to the public.<sup>2</sup> Liability in such cases, it should be noticed, is not confined to negligence.

### § 7. OF LEGAL CAUSE: CONTRIBUTORY FAULT.

92. The defendant's misconduct must have been the legal cause, or part of the legal cause, of that of which the plaintiff complains, to enable the plaintiff to recover judgment. Having regard to the defendant and third persons, it need not be the sole cause; it matters not that others helped the matter along, so far as the right of the injured person to sue any one (as well as all of them) is concerned. But considering only the person injured and the defendant, the defendant's conduct must have been the sole cause of complaint; if the plaintiff's own conduct made part of the cause of action, he cannot recover.

Plaintiff's  
misconduct  
as part of the  
cause of  
trouble.

93. In such a case the defendant has violated no duty to the plaintiff, whatever duty he may have owed; it is the plaintiff and the defendant together who have done or omitted the thing complained of. And whatever might be said in favor of separating the conduct of the defendant from that of the plaintiff, where the plaintiff's conduct was not the sole cause of the injury, the courts generally have looked upon

<sup>1</sup> *Ellis v. Sheffield Gas Co.*, 2 El. & B. 767.

<sup>2</sup> *Cuff v. Newark R. Co.*, supra; *Storrs v. Utica*, 17 N. Y. 104; *Chicago v. Robbins*, 2 Black, 418; *Holmes v. Northeastern Ry. Co.*, L. R. 4 Ex. 254; *Smith v. London Docks Co.*, L. R. 3 C. P. 326.

it as unwise, if not impracticable, to attempt to administer the law in that way.<sup>1</sup>

94. The courts however are very careful to distinguish mere conditions from legal causes.<sup>2</sup> In a certain sense of the word 'cause,' as used by able metaphysicians, the plaintiff cannot but be part at least of the cause of his misfortune, for unless he or his property was where he or it was at the time in question, no harm could have befallen him, and that of course whether his own conduct in the matter was wrongful or not. But that is not the conception of cause which the courts have adopted; the courts distinguish, as was just stated, between things or situations which are but conditions necessary to the happening of any misfortune, and things or situations which in themselves have the promise or potency of misfortune. A result is, legally speaking, caused when it happens as the natural effect of that which brings it to pass; the case is this, that standing with knowledge or what should be accounted knowledge of certain facts, harm is likely to follow in natural course. Hence there can be no breach of duty by the defendant when, in such a case, the plaintiff himself does or omits to do the thing which, though in necessary connection with the defendant's misconduct, is likely to produce the harm.

95. On the other hand, if what the plaintiff has done or omitted was not likely to produce the harm, or any harm at all, his doing or omitting is no more than a condition to the result, and the defendant *has* violated his duty to the plaintiff. He alone, considering none but the plaintiff and the defendant, has caused the damage.<sup>3</sup>

<sup>1</sup> A few courts have, in cases of negligence, adopted a suggestion of admiralty law, and resorted to a *comparison* of fault between the plaintiff and defendant, rejecting the doctrine of contributory fault. See post, p. 396.

<sup>2</sup> See e. g. *Newcomb v. Boston Protective Department*, 146 Mass. 596; Cases, 557.

<sup>3</sup> The case is often treated as a phase of the maxim '*causa proxima, non remota, spectatur*,' considered in the next section.

96. The doctrine in question is obviously a general one, applying to all torts. As a matter of fact however it is seldom called into service except in cases of negligence; there almost exclusively it has found its development, and there it has special phases that will require particular examination when the subject of negligence is reached. The reader is accordingly referred to the chapter on Negligence for further information.<sup>1</sup>

### § 8. OF TERMINATION OF LIABILITY.

97. Liability for tort having been incurred, how far does it extend? For it is obvious that a train of unfortunate results may follow. The general answer to the question, though scarcely an answer at all until explained, is that a man is liable for all such consequences of his torts, as, legally speaking, he has caused. This answer is often put in terms of a maxim or rule of the Roman law, adopted into our jurisprudence; ‘*causa proxima, non remota, spectatur*,’ — the law regards the ‘proximate,’ not the ‘remote’ cause.

*Causa  
proxima, non  
remota,  
spectatur.*

98. With reference to this maxim, nothing could be more misleading than to take it in its plain, primary sense; in that sense the law as often regards the ‘remote’ and disregards the proximate cause, as it does the contrary. A tosses a lighted squib into one of the booths of a market, and B, the owner of the booth, instinctively throws it out and it falls into the booth of C, who repeats the instinctive act, but now the squib strikes D in the face and puts out his eye. C obviously is nearest, or ‘proximate’ in the primary sense, to D, and A is most ‘remote’ of all; and yet A is liable to D, and C probably is not; A is liable whether C is or is not, supposing that C has acted instinctively and not of purpose, negligence, or other wrongful conduct towards D.<sup>2</sup> It is obvious that the maxim is to be taken in some metaphysical sense; B and C

<sup>1</sup> See also L. C. Torts, 721-725.

<sup>2</sup> Scott v. Shepherd, 2 W. Black. 392.

must be regarded as machines, and the final result as happening in the natural course of things.

99. 'Results happening in the natural course of things' is the more common way of putting the case; a tort having been committed, the wrongdoer is liable for whatever happens in the natural course of things, having regard to the time when the tort was committed.

Natural  
course of  
things at out-  
set.

The rule does not mean, broadly, that liability extends to whatever occurs in the course of nature; it means what occurs in the course of nature as things were known when the wrong was first done. Thus a person who, in violation of law, should start a fire in the highway would be liable for damage done by any spread of the fire in the condition of the atmosphere when the fire was started, or while it was still under control; but not perhaps for damage produced by a hurricane or tempest suddenly and unexpectedly arising.<sup>1</sup>

100. On the other hand, it is not necessary that the *particular* mischief resulting should have been foreseen or regarded as probable. A person who sets a fire wrongfully,

Actual result  
need not have  
been foreseen.

or does not properly guard a fire which he sets, in a dry stubble in midsummer, is liable for damage done by its spread, under the observable conditions of the air at first prevailing, even in case the fire should unexpectedly cross broad fields and extend to buildings or haystacks beyond.<sup>2</sup> In like manner one who wrongfully sets a fire or unlawfully allows a fire to get under way among timbers floating down a stream, the burning timbers finally causing the destruction of property several miles below, is liable for the loss; he has in the legal sense caused the loss, however improbable it may have been, because it happened in the natural course of things understood. So again one who unlawfully strikes another will be liable for what ensues naturally from the known state of things in the person struck, though the result appears to be out of proportion to the blow,<sup>3</sup>

<sup>1</sup> Post, p. 397; Wharton, Negligence, §§ 114-116, 2d ed.

<sup>2</sup> Smith v. Southwestern Ry. Co., L. R. 5 C. P. 98; 6 C. P. 14 (Ex. Ch.).

<sup>3</sup> See Stewart v. Ripon, 38 Wis. 584.

though probably not for consequences due, with the blow, to some occult and unknown disease.<sup>1</sup>

101. It is enough in all such cases that the wrongdoer knows, or is bound to know from the facts of which he is aware, that harm will follow, or is likely to follow, his improper act or omission in the understood state of things. The conditions to the harm which follows are before him; danger is observable. This is again returning to language used in speaking of duty. Duty exists where danger, either directly or through facts which the defendant knows or ought to know, is observable. It must follow that duty lasts to, and includes all results flowing naturally from, the defendant's wrongful act or omission; duty equally must end at, and exclude, results which happen out of natural course, as things were known to exist. And liability must end where duty ends; the plaintiff can have no right towards which there is no correlative duty. The doctrine of duty then, rightly understood, determines both the creation and the termination of liability.

Liability for  
consequences  
turns on duty.

102. This way of putting the case, which is now the usual way, puts aside the persistent doctrine or dogma that a man intends the natural and probable consequences of his conduct. The statement is not only unnecessary, it is untrue in most cases. The notion appears to spring from an idea that liability for the consequences of conduct depends upon intention to bring the consequences to pass; for which there is no authority. There will of course be intention, since every psychic act or omission, as we have seen, necessarily implies intention. But the resulting breach of duty and infringement of right (where the act or omission was wrongful) may not have been in the mind at all, that is, may not have been intended; and it has never been supposed to be necessary to say that the result is

Intending the  
natural conse-  
quences.

<sup>1</sup> Compare *Stewart v. Ripon*, supra; *Sharp v. Powell*, L. R. 7 C. P. 258. For other cases involving the general principle, see *Vandenburgh v. Truax*, 4 Denio, 464; *McDonald v. Snelling*, 14 Allen, 290 (defendant negligently running into a team and causing the horses to run away and collide with plaintiff's sleigh); *Farrant v. Barnes*, 11 C. B. N. S. 553.



intended where it follows closely upon the act or omission. Liability arises in the case because the misconduct caused the breach. So in these other cases, where the misfortune is further off in time or space. The question simply is, whether the defendant's conduct caused the harm. The dogma in question confuses acts and omissions with their effect.

103. There is, or may be, special difficulty where the train of events instead of going on in nature, or through human beings acting mechanically, extends through the intermediate human agency. acts of men conducting themselves freely and without constraint. In such cases it appears to be necessary that the intermediate human agencies should act in accordance with the purpose of the one further back who set the train in motion. The connection between the sufferer and such person would be broken if some one, or some force of nature, between them were to act in the matter 'out of course,' that is, in a way not to be expected; the wrongdoer can owe no duty to a person who sustains damage from the wrong, unless in natural or expected course.<sup>1</sup>

104. But if the intermediate persons, few or many, act in accordance with the purpose of the one back of them, though they be not his agents or his servants, he will be liable for damage done, not because the acts of the intermediate persons are in fact his acts, but because he has, legally speaking, caused the damage. He owed a duty to the person who should ultimately fulfil his purpose; looking forward to such action created the duty. And that duty he has violated.

105. There is some question whether the train thus set in motion, and continued in motion by an independent set of persons, should be inherently dangerous; it is certain that if it is, liability runs back to the person who started it. Thus A, who is a manufacturer of drugs, puts a quantity of belladonna, a violent poison, into jars which he labels dandelion,

<sup>1</sup> See such cases as *Carter v. Towne*, 103 Mass. 507; *Davidson v. Nichols*, 11 Allen, 514; *Insurance Co. v. Tweed*, 7 Wall. 44, 52.



a harmless drug; he sells the same to B, a wholesale dealer; B in turn sells to C, a retail dealer; and C sells to D, who buys the drug for his own use as dandelion, takes it as such, and is injured. A is liable to D.<sup>1</sup> The drug sold (in accordance with A's purpose) was inherently dangerous; but there is authority for saying that the result would be the same though the thing in question, as for instance a folding bed, were not inherently dangerous, but dangerous only for some vice in it.<sup>2</sup>

106. The principle in question applies generally to all kinds of tort, but as a matter of fact it seldom finds expression except in cases of negligence; some phases of it are almost of necessity phases of negligence. The consequence is that the subject must be considered particularly under that head, and it will not be considered further here.<sup>3</sup>

## § 9. OF DEATH OF PLAINTIFF OR DEFENDANT.

107. Liability for tort may come to an end in a very different way from any capable of being stated in terms of the cessation of duty; 'actio personalis moritur cum persona.' Expressing the rule in terms of the Roman law, the courts have from early times declared that (most) torts cease, with the death of either of the parties to them, to carry liability.<sup>4</sup> Both the origin and the justification of this rule are matter of doubt; but no common-law rule has been more steadily maintained, except as statute has affected it. It matters not that an

Rule of actio personalis: origin doubtful: modifications.

<sup>1</sup> Thomas v. Winchester, 6 N. Y. 397; Cases, 567.

<sup>2</sup> Lewis v. Terry, 43 Pac. Rep. 398 (Cal.).

<sup>3</sup> See post, pp. 397, 398.

<sup>4</sup> See e. g. Bowker v. Evans, 15 Q. B. Div. 565, death of plaintiff. The rule is not confined to torts. The action for breach of promise of marriage 'moritur cum persona.' Finlay v. Chirney, 20 Q. B. Div. 494; Hovey v. Page, 55 Maine. 142; Lattimore v. Simmons, 13 Serg. & R. 183; Stebbins v. Palmer, 1 Pick. 71; Smith v. Sherman, 4 Cush. 408. Aliter, if special damage to property is caused. Finlay v. Chirney; Stebbins v. Palmer. See *infra*.

action may already have been set on foot,<sup>1</sup> the rule applies with absolute impartiality.

108. It has been suggested that the rule may have come into operation when the processes of the courts were finally putting aside the right of private redress for wrongs which had prevailed under what may be called customary law. 'A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man's estate.'<sup>2</sup> Whether this be true or not of cases of the death of the wrongdoer,—it would not explain the effect of death by the injured person,—reasons were found even in early times which brought about legislation to limit any possible application of the rule to cases in which the tort directly affected the injured man's property.<sup>3</sup> Legislation of the kind began as early as the year 1330, which gave an action for 'goods and chattels of . . . testators carried away in their life;' and twenty-one years later the same right of action was given, by construction of statute, to administrators.<sup>4</sup> These statutes have been adopted in America; and to them (as in England) have been added statutes, varying more or less in the different States, in favor of the nearest kindred of persons killed by misconduct of others. The latter statutes, however, have no place in a consideration of General Doctrine.

<sup>1</sup> *Bowker v. Evans*, supra, an arbitration.

<sup>2</sup> Pollock, *Torts*, 55, 2d ed., to which is added a dictum by Newton, C. J., from Year Book 19 Hen. 6, pl. 10 (A. D. 1440-1): 'If one doth a trespass to me and dieth, the action is dead also, because it should be inconvenient to recover against one who was not party to the wrong.'

<sup>3</sup> 'The distinction seems to be between causes of action which affect the estate, and those which affect the person only. . . . According to this distinction, an action for the breach of a promise of marriage would not survive; for it is a contract merely personal; at least it does not necessarily affect property. . . . The injury complained of is violated faith, more resembling in substance deceit and fraud than a mere common breach of promise.' Wilde, J., in *Stebbins v. Palmer*, 1 Pick. 71, 79. If it be said that the same is true of many other contracts which do survive, the only answer perhaps is, that a rule, like that of *actio personalis*, not founded in sound reason, will be apt to be departed from more or less.

<sup>4</sup> 4 Edw. 3, c. 7; 25 Edw. 3, st. 5, c. 5. See *Phillips v. Homfray*, 24 Ch. Div. 439.

## § 10. OF ASSIGNABILITY OF ACTIONS FOR TORT.

109. Actions for tort not harmful to property are not assignable.<sup>1</sup> Various reasons have been given, the common one being that such actions are peculiarly personal. How, it is asked, can another represent one whose good name has been tarnished, or whose happiness has been ruined?<sup>2</sup> Perhaps the explanation really runs back to the time when torts had not yet detached themselves from crimes. Crimes of course were always personal; torts continued, after the separation, to be regarded as of the same nature, except where damage was done to property. It may also be noticed that things which are not descendible, as torts are not,<sup>3</sup> are not ordinarily alienable. Torts however which harm property, as they survive, are assignable.<sup>4</sup> So too are *judgments* in damages for tort.<sup>5</sup>

<sup>1</sup> *Rice v. Stone*, 1 Allen, 566; *Stone v. Boston R. Co.*, 7 Gray, 539; *Howard v. Crowther*, 8 M. & W. 603.

<sup>2</sup> See *Rice v. Stone* and *Howard v. Crowther*, *supra*.

<sup>3</sup> *Supra*, p. 49.

<sup>4</sup> *Rice v. Stone*, *supra*.

<sup>5</sup> *Id.*; *Stone v. Boston R. Co.*, 7 Gray, 539. As to verdicts see *Rice v. Stone*.



## SPECIFIC TORTS.

[The shading of one topic into another is the ground of arrangement. In Part I. Deceit shades off into Slander of Title, and thus into Malice. Malice in turn shades off into the first of the topics of Part II., Unlawful Acts. These last shade into the topic of Part III., Negligence.]

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### PART I.

#### LAWFUL ACTS DONE BY WRONGFUL MEANS OR OF MALICE.

#### BREACH OF DUTY TO REFRAIN FROM FRAUD OR MALICE.



## CHAPTER I.

### 1. *Lawful Acts done by Wrongful Means : 'Fraud.*

#### DECEIT.

*Statement of the duty.* A owes to B the duty not to mislead him to his damage by false and fraudulent representations.

Deceit may be a ground of defence to the enforcement of a contract, and also a ground for proceedings by the injured party to rescind a contract. In such cases the same facts, apart from the wrongdoer's knowledge of the actual state of things, are necessary for establishing the deceit as are necessary to an action of or for deceit.<sup>1</sup> Hence, with the exception mentioned, authorities concerning the proof of deceit in cases of contract are authorities in regard to actions for damages by reason of deceit.

The action at law for damages by reason of deceit is called indifferently an action *of* deceit or an action *for* deceit.

#### § 1. WHAT MUST BE PROVED.

110. In order to establish a breach of the duty above stated, and to entitle B to civil redress therefor, B, unless he come within one of the qualifications to the rule, must make it appear to the court (1) that A has made a false representation of material facts; (2) that A made the same with knowledge of its falsity; (3) that B was ignorant of its falsity, and believed it to be true; (4) that it was made with intent that it should be acted upon by B; (5) that it was acted upon by B to his damage.<sup>2</sup>

Five chief facts to be proved in ordinary cases.

<sup>1</sup> King v. Eagle Mills, 10 Allen, 548; Wilder v. De Cou, 18 Minn. 470.

<sup>2</sup> Pasley v. Freeman, 3 T. R. 51; Cases, 1.



But each of these general elements of the right of redress must be separately examined and explained, and any qualifications to the same presented. The designation of the parties as A and B may now be dropped, and B will be spoken of as the plaintiff, and A as the defendant.

## § 2. OF THE REPRESENTATION.

111. It is proper first to consider the meaning, in the law, of the term 'representation,' and thus to ascertain the real foundation of the action under consideration. Accordingly, a representation may be defined to be a statement or an act, creating a clear impression of fact upon the mind of another, sufficient to influence the conduct of a man of ordinary intelligence.

112. As a matter of language there may be no difference whatever between a representation and a warranty. The statement 'This horse is sound' may be the one or the other. The following external distinctions however will suggest certain tests for deciding cases to which they are applicable: A warranty is always annexed to some contract and is part of that contract; the warranty is indeed a contract itself,<sup>1</sup> though a subsidiary one, dependent upon the main agreement. A representation however is in no case more than inducement to a contract; it is never part of one. To carry it into a contract would be to make it a warranty. And again, there may be a representation, such as the law will take cognizance of, though no contract was made or attempted between the one who made the representation and the one to whom it was made.

113. This would be sufficient to distinguish the two terms, if it were necessary to a warranty that it should be expressly annexed to the contract-in-chief; but that is not necessary, and that fact sometimes creates difficulty. In written contracts there can seldom be difficulty in determining whether

<sup>1</sup> Brownlie v. Campbell, 5 App. Cas. 925, 953, Lord Blackburn. An affirmative warranty is ordinarily an artificial contract of the law. Ante, p. 27, note.

a particular statement is a warranty or a representation (when it is either), for the warranty must be part of the writing, since a warranty must be part of the contract-in-chief,<sup>1</sup> and it will either be directly incorporated into the general writing, or be so connected with it by apt language<sup>2</sup> that there can be no doubt of the intention of the parties.

114. The difficulty is with oral contracts, and then in most cases only in regard to sales of personalty. Whether the statement in question is a representation or a warranty is however treated as a question of intention;<sup>3</sup> and an intention to create a warranty is shown, it seems, by evidence of material statements of fact made as an inducement to the sale, at the time the bargain was effected, or during negotiations therefor which have been completed in proper reliance upon the statements;<sup>4</sup> provided nothing at variance with the inference of intention is shown.<sup>5</sup> If the statement was not so made, it is a representation if it is anything. What difficulty remains is in the application of the rule; and that is a matter for works treating of contracts or warranty in detail.

115. A warranty of fact however, when broken, may be treated, it seems, as a case of misrepresentation, giving rise to an action for deceit, if

**Warranty  
treated as  
representation.**

<sup>1</sup> *Kain v. Old*, 2 B. & C. 627.

<sup>2</sup> A warranty may indeed be implied, i. e. arise without language or intention, but such cases are aside from the present purpose. The difficulty under consideration concerns the effect of language used.

<sup>3</sup> There may be no intention, in point of actual fact, to create a warranty; but intention may be inferred beyond dispute by what was said or done. It is therefore more properly a question of the interpretation or meaning of words or conduct than of intention in the sense of what was in the mind.

<sup>4</sup> See *Harrington v. Smith*, 138 Mass. 92, 98; *Hopkins v. Tanqueray*, 15 C. B. 130. This will explain many cases in which it is held that a vendor of personalty is liable for his false representations though he believed them to be true. See *Sledge v. Scott*, 56 Ala. 202; post, p. 70. In such cases there is in reality a warranty, and hence the vendor's knowledge is immaterial, though the case is not always put on the ground of warranty.

<sup>5</sup> Such appears to be the effect of the cases. See Benjamin, Sales, § 613.

the elements necessary to liability in a proper case of misrepresentation are present;<sup>1</sup> and this, it is believed, is true whether the warranty was express or implied. Indeed, in case of implied warranty the breach may possibly be enough to make the case one of deceit.<sup>2</sup> This reduces the matter to a question of the form of action. But it is very doubtful whether an action based on deceit could be maintained where the evidence showed nothing but a breach of warranty.<sup>3</sup> That would, in the language of pleading, be a variance; the action should be on the warranty as such.

116. Consider now the definition above given of the term 'representation.' A representation must consist in 'a statement or an act.' There are, it is true, cases in which legal consequences may attend absolute silence; but there are very few cases<sup>4</sup> in which an action for damages on account of silence alone can be maintained. There must ordinarily be some additional element to make silence actionable. If the silence consists in withholding part of the truth of a statement, it may be actionable, as will be seen later; but in such a case silence is properly speaking, only part of the representation. The silence amounts to saying that what has been stated is all. There is a duty to speak in such a case, and it is only when there is such a duty that silence has any legal significance.

117. Indeed, even passive concealment, that is, intentional withholding of information, when not attended with any active conduct tending to mislead, is insufficient, according to the general current of common-law

**Analysis of the definition of 'representation': 'statement or act': silence.**

**Passive concealment.**

<sup>1</sup> See *Indianapolis R. Co. v. Tyng*, 63 N. Y. 653.

<sup>2</sup> *White v. Madison*, 26 N. Y. 117, 124; *Jefts v. York*, 10 Cush. 392; *Johnson v. Smith*, 21 Conn. 627; *Collen v. Wright*, 8 El. & B. 647; *Randell v. Trimen*, 18 C. B. 786; *Seton v. Lafone*, 18 Q. B. D. 139, affirmed on appeal, 19 Q. B. D. 68; post, p. 70.

<sup>3</sup> *Mahurin v. Harding*, 28 N. H. 128; *Cooper v. Landon*, 102 Mass. 58; *Larey v. Taliaferro*, 57 Ga. 443.

<sup>4</sup> Silence might be ground for an action in deceit by a cestui que trust against his trustee, it seems, in a transaction between the two in regard to the trust property to the damage of the former.

authority, to create a cause of action. For example: The defendant, knowing of the existence of facts tending to enhance the price of tobacco, of which facts the plaintiff is ignorant to the defendant's knowledge, buys a quantity of tobacco of the plaintiff at current prices, withholding information of the facts referred to (no question being asked to bring them out). This is no breach of duty to the plaintiff.<sup>1</sup> Again: The defendant buys of the plaintiff land in which there is a mine, the defendant knowing the fact, and knowing that the plaintiff is ignorant of it. The defendant does not disclose the fact in the negotiations for the purchase. This is no breach of duty.<sup>2</sup>

118. An act however, attending what would otherwise be a case of perfect silence, in regard to the fact in question, may have the effect to create a representation, and lay the foundation, so far, for an action;<sup>3</sup> Acts accompanying silence. but the act must be significant and misleading.<sup>4</sup> For that purpose however it may be slight;<sup>5</sup> a nod of the head may no doubt be enough, so may a withdrawing of attention from some point to which it is being or about to be directed.

<sup>1</sup> *Laidlaw v. Organ*, 2 Wheat. 178. See *Prescott v. Wright*, 4 Gray, 461, 464; *Kintzing v. McElrath*, 5 Barr, 467; *Smith v. Countryman*, 30 N. Y. 655, 670, 671; *People's Bank v. Bogart*, 81 N. Y. 101; *Hanson v. Edgerley*, 29 N. H. 343; *Fisher v. Budlong*, 10 R. I. 525, 527; *Hadley v. Clinton Importing Co.*, 13 Ohio St. 502; *Williams v. Spurr*, 24 Mich. 335; *Law v. Grant*, 37 Wis. 548; *Cogel v. Kinseley*, 89 Ill. 598; *Frenzel v. Miller*, 37 Ind. 1; *Smith v. Hughes*, L. R. 6 Q. B. 597; *Evans v. Carrington*, 2 De G. & J. 481; *Peck v. Gurney*, L. R. 9 H. L. 377, Lord Cairns; *Coaks v. Boswell*, 11 App. Cas. 232, Lord Selborne. 'Whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.' Blackburn, J., in *Smith v. Hughes*, supra. Contra in some of the States. *Patterson v. Kirkland*, 34 Miss. 423; *Cecil v. Spurgur*, 32 Mo. 462; *Lunn v. Shermer*, 93 N. Car. 164; *Merritt v. Robinson*, 35 Ark. 483.

<sup>2</sup> *Fox v. Mackreth*, 2 Bro. C. C. 400, 420, a leading case in equity. See *Turner v. Harvey*, Jacobs, 169, 178, Lord Eldon.

<sup>3</sup> *Laidlaw v. Organ*, supra; *Hadley v. Clinton Importing Co.*, supra.

<sup>4</sup> *Id.*

<sup>5</sup> *Turner v. Harvey*, Jacob, at p. 178.

119. To make a representation, the statement or act must create a 'clear impression;' the plaintiff does not make out the alleged breach of duty if his evidence shows **Clear impression.** only a statement or act of vague or indefinite import. Such statements or acts would have little effect upon a man of average intelligence; and hence, whatever the actual effect produced in a particular case, the law takes no notice of them. For example: The defendant, a vendor of land, points to a certain tree as the *probable* boundary of his premises, and the plaintiff buys relying upon that statement as a statement of the actual boundary. The defendant is not liable in damages for the loss sustained by the plaintiff.<sup>1</sup>

120. The representation need not however be created by language; there is no distinction between an impression **Words not necessary.** created by words and one created by acts.<sup>2</sup> Language is only one of the means of conveying thought. A thought may often be conveyed as distinctly by an act; enough, so far, that a clear impression is created upon the mind. If the impression is capable of being stated as a fact, and is such as might govern the conduct of an average man in regard to some change of position in contemplation, it satisfies the rule.

121. It follows that, to constitute a representation, it is not necessary, even when language alone is used, that the statements should be made in terms expressly affirming the existence of some fact. If the statement be such as would naturally lead the plaintiff, as a man of average intelligence, to suppose the existence of a particular state of facts, that is as much as if statements had so been made in exact terms.<sup>3</sup>

122. It should be noticed that there is a difference in fact between vagueness and ambiguity. Vagueness, as we have

<sup>1</sup> See *Halls v. Thompson*, 1 Smedes & M. 443.

<sup>2</sup> *Lobdell v. Baker*, 1 Met. 193; *Coolidge v. Brigham*, id. 547, 551; *Mizner v. Kussell*, 29 Mich. 229; *Paddock v. Strobbridge*, 29 Vt. 470. These are cases of warranties, but the principle is the same.

<sup>3</sup> *Donovan v. Donovan*, 9 Allen, 140; *Rhode v. Alley*, 27 Texas, 443, 446; *Lee v. Jones*, 17 C. B. N. S. 482; s. c. 14 C. B. N. S. 386.



seen, is fatal to the idea of a legal representation ; but ambiguity in an impression may only mean that more than one fact has been impressed upon the mind, not that none at all has been left there. In such a case as this the only question that can arise in reason or in law is whether, assuming the facts impressed to be clear and definite, the plaintiff reasonably acted upon the one which was false. That he did this it devolves upon him to show. For example : The defendants issue a prospectus in regard to a company, in process of formation to take over certain iron works, which prospectus contains the following statement : ‘The present value of the turnover or output of the entire works is a million pounds sterling per annum.’ This statement might mean either that the works had actually turned out more than a million’s worth at present prices within a year or yearly, or only that the works were capable of turning out so much ; in the former case it is false, in the latter it might be true. The plaintiff, who has been induced to buy shares in the undertaking, must show that he acted upon the statement in the sense in which it was false.<sup>1</sup>

Vagueness  
and ambiguity  
distinguished.

123. The impression created must be of a ‘fact,’ a word which imports something capable of being known. Does this mean, in the case of a statement, that what is stated must be stated as a fact? There is some confusion in the books in regard to this question. It is commonly said that the law takes no notice of statements of opinion, or of statements in regard to future events or conduct short of contract. But that is by no means universally true ; and even when true its truth does not rest upon the ground that such statements are not statements of fact. As a matter of form it is true that statements of opinion and statements relating to the future ordinarily are not statements of fact ; but in reality they always involve and imply statements of fact. The fact involved is indeed a *mental* fact, to wit, the state of mind — the opinion, belief, or intention — of the person speaking. But a mental fact is

Impression of  
fact necessary :  
opinion as fact.

<sup>1</sup> Smith v. Chadwick, 9 App. Cas. 187; s. c. 20 Ch. Div. 27.

as truly a fact as a non-mental fact; the person making it knows whether it is true or false. He knows whether his belief or intention is as he has stated. Anything capable of being known is a fact, as the law looks upon the subject; and a mental fact is as capable of being known as a non-mental fact.

124. The result is that when a man states that his opinion, belief, or intention is so and so, he has virtually and in real effect stated that he knows of nothing to make his statement of opinion, belief, or intention a sham. If then the law requires that what is stated should be stated as a fact, the case in question fulfils the requirement; the statement is in effect — and that is the real test — a statement of fact. For example: The defendant, seller of a hotel under lease, says to the plaintiff, the buyer, that the tenant is a ‘most desirable tenant.’ Assuming that what is ‘desirable’ in such a case is matter of opinion, still the statement is in effect a statement of fact, for the seller ‘impliedly states that he knows facts which justify his opinion.’<sup>1</sup> Again: The defendant, a cattle dealer, selling cattle to the plaintiff, states that he is of opinion that the cattle will weigh 900 lbs. and upwards per head. This in effect is a statement of fact, to wit, that the defendant knows nothing to make the opinion a sham.<sup>2</sup>

125. These are cases of statements (in the form) of opinion; but it is obvious that statements in regard to the future stand upon the same footing. Thus, if a person were to say that a certain ship ‘will arrive to-morrow,’ that would amount to a statement that he knew nothing to the contrary, and hence would be a statement of fact. So a promise to pay for property bought imports a statement of intention to pay; and intention is a matter of fact.<sup>3</sup>

126. It is clear then that the contrast usually drawn or suggested is a false one.<sup>4</sup> The true contrast is suggested

<sup>1</sup> *Smith v. Land & House Corp.*, 28 Ch. Div. 7; Cases, 26, 33, note.

<sup>2</sup> *Birdsey v. Butterfield*, 34 Wis. 52.

<sup>3</sup> See *Karberg's Case*, 1892, 3 Ch. 1, 11, Lindley, L. J.

<sup>4</sup> See for instance *American Bank v. Hammond*, 25 Col. 367; *Whiting v. Price*, 169 Mass. 576; s. c. 172 Mass. 240 (statements relating to the value of a bond); *Andrews v. Jackson*, 168 Mass. 266; *Stubbs v. Johu-*



by the following paragraph; it is between things, whether put as fact or as opinion, belief, or intention, which are persuasive of action, and things which are not.

False contrast of fact and opinion: the true contrast.

127. The statement or act must be one 'sufficient to influence the conduct of a man of ordinary intelligence.' The meaning of this rule however, like that of the one just considered, is in some particulars a matter of doubt. Thus, in the sale of goods 'simplex commendatio non obligat.' But what is 'simplex commendatio'? A simple statement of value by a vendor is a clear case on the one hand; a plain statement of fact going to make up value, as the age of a horse, is an equally clear case on the other. But what of statements falling between the two extremes?<sup>1</sup> The question cannot be definitely answered; most of the cases that arise have to be determined upon the special facts attending them. That is to say, particular rules can seldom be framed to reach them, and general rules have only a remote bearing upon them.

What was said or done must have been sufficient to influence conduct: examples.

128. One or two limited rules however have been laid down touching the subject. It has been declared by able courts,<sup>2</sup> and denied by others,<sup>3</sup> that a vendor's false statements of what an article or a tract of land cost, or what at some time it has brought, or what has been offered for it, may come within the cognizance of the law like ordinary representations of fact. Some courts indeed have gone

son, 127 Mass. 219 (a note, 'as good as gold'); *Safford v. Grout*, 120 Mass. 20.

<sup>1</sup> The requirement that the statement or act must be sufficient to influence conduct, and its sufficiency if it does, cover the common case of the books of one occupying a superior position for information, or of an expert, of which *Wilson v. Nichols*, 72 Conn. 173, is a late example.

<sup>2</sup> *Van Epps v. Harrison*, 5 Hill, 63; *Page v. Parker*, 43 N. H. 363; *Somers v. Richards*, 46 Vt. 170; *Ives v. Carter*, 24 Conn. 392; *McAleer v. Horsey*, 35 Md. 439; *McFadden v. Robinson*, 35 Ind. 24; *Morehead v. Eades*, 3 Bush, 121. The rule in these cases appears to be the better one.

<sup>3</sup> *Medbury v. Watson*, 6 Met. 246; *Cooper v. Lovering*, 106 Mass. 79; *Martin v. Jordan*, 60 Maine, 531; *Bishop v. Small*, 63 Maine, 12.

much further than denying this proposition.<sup>1</sup> But it is generally agreed that such statements when made, not by the vendor, but by a stranger, may constitute actionable misrepresentations. For example: The defendant, not being the seller of the property, falsely states that a tannery has on a previous sale brought a certain price. This is a misrepresentation capable of sustaining an action under the law.<sup>2</sup>

129. It is settled law that statements of the income of property, or of the rental receipts of a leasehold estate to be sold, constitute representations of fact which may safely be acted upon. For example: The defendant, seller of a public-house, falsely tells the buyer, the plaintiff, that the receipts of the house have been £160 per month, and that the tap is let for £82 per annum, and two rooms for £27 per annum. This is a false representation sufficient to influence conduct, and not a mere statement of value.<sup>3</sup> So possibly if the statement were that the present 'value' of the property is a certain sum per year; for that might mean its annual return.<sup>4</sup>

130. Statements concerning the pecuniary condition of an individual, as for instance of the amount of property he owns, also stand upon a different footing from statements of value; they may govern conduct.<sup>5</sup> For example: The defendant says to the plaintiff, 'F is pecuniarily responsible. You can safely trust him for goods to the amount of £3,000.' This is a representation of fact which may govern conduct.<sup>6</sup>

<sup>1</sup> *Holbrook v. Connor*, 60 Maine, 576, false statements concerning deposits of oil in lands, and that the lands were of great value for making oil, held mere opinion, by a majority.

<sup>2</sup> *Medbury v. Watson*, 6 Met. 246.

<sup>3</sup> *Dobell v. Stevens*, 3 B. & C. 623; *Medbury v. Watson*, *supra*, at p. 260; *Ellis v. Andrews*, 56 N. Y. 83, 86. See *Fuller v. Wilson*, 3 Q. B. 58; *Lysney v. Selby*, 2 Ld. Raym. 1118.

<sup>4</sup> See *Smith v. Chadwick*, 9 App. Cas. 187, *ante*, p. 61. But see *Ellis v. Andrews*, *nt supra*.

<sup>5</sup> *Pasley v. Freeman*, 3 T. R. 51; *Cases*, 1; *Brock v. Garson*, 117 Mich. 550. Such representations must now in many States be proved by writing signed by the party to be charged.

<sup>6</sup> *Pasley v. Freeman*, *supra*.

131. Again, to come within the notice of the law, the representation, if not made by a lawyer to a layman, or by a man professing familiarity with the law to one not familiar with it, must, it seems, be more than a mere representation of what the law is. The <sup>Representations of the law.</sup> reason of this has sometimes been said to be that all men are presumed to know the law; ‘ignorantia legis neminem excusat.’ But it may be doubted whether that is the true ground of the rule; if it were, misrepresentation of the law by one’s legal counsel could hardly be made the foundation of any liability. A better reason appears to be that the law is understood by all men to be a special branch of learning; and hence what one layman may say to another will seldom have the effect to alter conduct. But whatever the ground, the rule appears to be treated as settled. For example: The defendant misrepresents the legal effect of a contract which he thereby induces the plaintiff to enter into with him, both parties being laymen. The defendant is not liable in damages for the loss inflicted upon the plaintiff.<sup>1</sup>

132. As the language above used however plainly implies, it is not broadly true that a misrepresentation of the law may not be ground for an action of deceit. If a person having superior means of knowing the law, and professing to know it, though not a lawyer and not professing to be, should knowingly give false information of it in order to influence the conduct of one ignorant of the same, there would (so far) be an actionable misrepresentation. For example: An immigrant, lately arrived from abroad, meets an old citizen, who professes familiarity with the land titles of the country, and proposes to sell land to him, to which he falsely assures the immigrant the title is good. This is a misrepresentation capable of sustaining an action.<sup>2</sup>

<sup>1</sup> *Upton v. Tribilcock*, 91 U. S. 45. See *Lewis v. Jones*, 4 B. & C. 506; *Beattie v. Ebury*, L. R. 7 Ch. 777, 801; *Eaglesfield v. Londonderry*, 4 Ch. Div. 693, *Jessel, M. R.*, explaining the nature of a representation of law. And see *West London Bank v. Kitson*, 13 Q. B. Div. 360, 363, *Bowen, L. J.*

<sup>2</sup> *Moreland v. Atchison*, 19 Texas, 303.

**133.** The proposition in the last paragraph may be generalized. In ordinary cases the representation must be such as to influence the conduct of a man of average intelligence; but the courts have not turned over the simple to be the prey of rogues. If a person is mentally deficient, or is but a child, the courts will protect him from designing men where they would leave others to their own folly.<sup>1</sup>

**134.** It is practically the same thing with saying that the statement or act should be sufficient to influence conduct, to say that it should be material; which latter is the usual way of stating the rule. But whichever way the rule is stated, it is not to be understood that the law will not take notice of the case if influences from other sources may have operated upon the plaintiff. The only question upon this point is whether the representation made by the defendant was adequate to influence, and did influence, the plaintiff, not whether it was the sole inducement to the action taken; if it was sufficient to influence him, and did influence him to some real extent, that is enough. The courts will not be astute to find that one of several inducements present was not adequate to the damage.<sup>2</sup>

**135.** So far of the definition.

**136.** Further, it is for the plaintiff to show that the representation was false. But a representation is false in contemplation of law as well as of morals if it is false in a plain, practical sense; if, that is to say, it would be apt to create a false impression upon the mind of the average man. For example: The prospectus of a company about to construct a railway describes the contract for the work as entered into at 'a price considered within the

**Generaliza-  
tion.**

**Materiality,  
what is suffi-  
cient to influ-  
ence conduct.**

**Falsity of the  
representa-  
tion.**

<sup>1</sup> See post, p. 78.

<sup>2</sup> *James v. Hodsdon*, 46 Vt. 127; *Safford v. Grout*, 120 Mass. 20; *Jordan v. Pickett*, 78 Ala. 331; *Hale v. Philbrick*, 47 Iowa, 217; *McAleer v. Horsey*, 35 Md. 439; *Reynell v. Sprye*, 1 De G. M. & G. 660.

available capital of the company.' The fact is that there is a merely nominal capital of £500,000, and from this the sum of £50,000 is to be deducted for the purchase of the concession for making the railway, and the contract price for making it is £420,000. The representation is false; the term 'available capital' not being a true description of capital to be raised by borrowing.<sup>1</sup>

137. An example in contrast with the foregoing may be stated. A prospectus of a company formed for buying a certain business declares that the price of purchase is a stated sum, and that no 'promotion money' is to be paid to the directors of the company for making the purchase. In fact the sum paid for the business is somewhat less than the sum stated in the prospectus, and shares of the stock representing the difference are now transferred, part to the directors of the company who effected the purchase, which part is afterwards transferred to the company on complaint, and part to the solicitors in the transaction. This is not misrepresentation.<sup>2</sup>

138. The defendant cannot then escape liability by showing that the representation was, if literally taken, true, or true if taken in some forced or unnatural sense.<sup>3</sup> So too the defendant cannot rely upon the truth of the actual language used, when that is but part of the whole state of facts, and what was suppressed would, had it been stated, have given to the language used a contrary effect. If the part suppressed would have made the part stated false, there is a false representation.<sup>4</sup> For example: The defendant, desirous of buying stock of the plaintiff, a lady, of the value of which he knows that she is ignorant, tells her of a fact calculated to

<sup>1</sup> *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99. Another good example, *Smith v. Land & House Corp.*, 28 Ch. Div. 7; *Cases*, 26.

<sup>2</sup> *Arkwright v. Newbold*, 17 Ch. Div. 301. 'Nobody was ever lucky enough to sell a property without having some considerable deduction made out of the gross price, there being such persons as auctioneers and solicitors to be paid.' *James*, L. J.

<sup>3</sup> *Mizner v. Kussell*, 29 Mich. 229.

<sup>4</sup> *Peck v. Gurney*, L. R. 6 H. L. 377, 403, Lord Cairns; *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99, 113.

depreciate the value of the stock, but omits to disclose to her other facts within his knowledge which would have given correct information upon the subject. This is a breach of duty to the plaintiff.<sup>1</sup> Again: The plaintiff being about to supply the defendant's son with goods on credit, asks the defendant if the son has property to the value of £300, as the son has asserted. The defendant answers in the affirmative, stating that he has advanced the sum to his son, but failing to state that his son has given his promissory note for the amount. This is a false representation, though true in a literal sense.<sup>2</sup>

### § 3. OF DEFENDANT'S KNOWLEDGE OF FALSITY.

139. In order to entitle a plaintiff to recover damages for misrepresentation, it is necessary, by the more general current of authority, for him to prove that the defendant made the false representation fraudulently. A contract may, indeed, in many cases be rescinded, or its enforcement successfully resisted, for an innocent misrepresentation, that is to say for a false representation justifiably believed to be true at the outset by the party who made it;<sup>3</sup> but if damages are sought, fraud in some sense must be proved, whether at law or in equity.<sup>4</sup> Negligence, by the

Innocent misrepresentation.

<sup>1</sup> *Mallory v. Leach*, 35 Vt. 156.

<sup>2</sup> *Corbett v. Brown*, 8 Bing. 33; *Brook v. Garson*, 117 Mich. 550.

<sup>3</sup> *Arkwright v. Newbold*, 17 Ch. Div. 301; *Redgrave v. Hurd*, 20 Ch. Div. 1; *Blackman v. Johnson*, 35 Ala. 252; *Sledge v. Scott*, 56 Ala. 202.

<sup>4</sup> *Case v. Boughton*, 11 Wend. 106, 108; *Morgan v. Skiddy*, 62 N. Y. 319; *Cragie v. Hadley*, 99 N. Y. 131; *Code v. Cassidy*, 138 Mass. 437; *Bowker v. Delong*, 141 Mass. 315; *Mahurin v. Harding*, 28 N. H. 128; *Holdom v. Ayer*, 110 Ill. 448; *Lamm v. Port Deposit Assoc.*, 42 Md. 233; *Dunn v. White*, 63 Mo. 181; *Collins v. Jackson*, 54 Mich. 186; *Spangler v. Chapman*, 62 Iowa, 144; *Sims v. Eiland*, 56 Miss. 83 and 607; *Derry v. Peek*, 14 App. Cas. 237, reversing 37 Ch. Div. 541; *Joliffe v. Baker*, 11 Q. B. D. 255; *Arkwright v. Newbold*, 17 Ch. Div. 301, 320; *Redgrave v. Hurd*, 20 Ch. Div. 1; *Reese Mining Co. v. Smith*, L. R. 4 II. L. 64; *Childers v. Wooler*, 2 El. & E. 287; *Evans v. Edmonds*, 13 C. B. 777, 786. But see *Gaspie v. Keater*, 5 C. C. A. 474; *Lamberton v. Dunham*, 30 Atl. 716 (Penn.).

Proving the defendant's knowledge of the falsity of his representation



weight of authority, is not enough, unless there was a distinct duty to know<sup>1</sup> (of which presently).

140. Fraud as a technical term, within the meaning of this rule, or fraud in the narrower sense,<sup>2</sup> may be proved in one of three, and in some States in one of four ways, according to the nature of the case. It may be proved by showing (1) that the defendant made the representation with knowledge of its falsity; or (2) that he made it recklessly, without knowing whether it was true or false; or in some States (3) that he made it positively, or apparently as, of his own knowledge, when he only *believed* it to be true without having actual knowledge;<sup>3</sup> or (4) that he made it under circumstances in which he was so specially related to the facts that it was his duty to know whether the representation was true or not.<sup>4</sup>

Fraud and its  
legal equivalents  
in deceit.

is often called proving the 'scienter,' a term of the old common-law pleading.

<sup>1</sup> *Le Lievre v. Gould*, 1893, 1 Q. B. 491; *Derry v. Peek*, 14 App. Cas. 327, and other cases in note 4, p. 68. But see *Lambert v. Dunham*, 30 Atl. R. 716 (Penn.); *Glaspie v. Keater*, 5 C. C. A. 474. See a valuable article by Professor Smith, on Liability for Negligent Language, in the *Harvard Law Review* for November, 1900.

<sup>2</sup> The mental aspect of the larger idea of fraud as a means, i. e. as misrepresentation. See ante, p. 15.

<sup>3</sup> *Weeks v. Currier*, 172 Mass. 53, 55; *Scholfield Pulley Co. v. Scholfield*, 71 Conn. 1, 19.

<sup>4</sup> As to knowledge of falsity, that will be sufficient, as far as it goes, for any representation falling within the notice of the law. As to the second and third aspects of the case, see *Chatham v. Moffatt*, 147 Mass. 403, C. Allen, J.: 'The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge.' See *Scholfield Pulley Co. v. Scholfield*, 71 Conn. 1, 19. In this case it is laid down that a groundless belief by the defendant will not save him.

The rule itself in regard to statements of one's own knowledge is not free from difficulties. Is not any positive assertion an assertion, in natural import, of knowledge? Is then proof of the falsity alone of a positive assertion sufficient proof on this head? So the cases are driven to decide in upholding the rule.



141. The fourth of these aspects of the case calls for a few remarks. There the defendant stands in a peculiar situation in regard to the facts; the facts are specially **The fourth of these methods.** within his reach; they are not facts that others may, even by inquiry, know as well. The result is, that any representation made by him touching them is likely to carry great weight, greater, other things being equal, than representations made in other cases. This fact may well be held enough to govern his conduct, and to require him to know the truth of the representation; in a word, he may be held practically to have warranted the representation to be true, and, warranting it, he cannot require the party with whom he has dealt to prove that he knew it to be false when he made it.<sup>1</sup>

142. Accordingly this phase of fraud may possibly be treated as a case either of warranty or of deceit; but in the **Warranty of authority.** absence of actual fraud, the better view is that the case should be treated as one of implied warranty.<sup>2</sup> It is believed that cases of implied as well as of express warranty are capable of being treated as falling under the head of deceit as thus explained.<sup>3</sup> A typical illustration

<sup>1</sup> See *Lord v. Goddard*, 13 How. 198; *White v. Madison*, 26 N. Y. 117, 124; *Jefts v. York*, 10 Cush. 392, 396, *Shaw, C. J.*; *Collen v. Wright*, 8 El. & B. 647, Ex. Ch. See *Denton v. Great Northern Railway Co.*, 5 El. & B. 860, in regard to representations by railway time tables. Whether the text would apply generally to representations made by any with whom the plaintiff was not dealing, quære. (In such cases 'warranty' would be a term of convenience merely.) Compare the distinction taken in *Einstein v. Marshall*, 53 Ala. 153; but that may not have been intended to apply to cases like that of the text.

<sup>2</sup> In *Jefts v. York*, supra, Chief Justice Shaw says of implied representations of agency that the action should be in tort. See further *Schuchhardt v. Allen*, 1 Wall. 359, 368; *Shipper v. Bowen*, 122 U. S. 575; *Sims v. American Tel. Co.*, 5 Q. B. D. 188.

<sup>3</sup> For the purpose of defence to or rescission of most contracts, by reason of misrepresentations which were innocent, it is not necessary that these should have been warranties. Defence or rescission is to be distinguished from an action for damages. That, at all events, is the more general rule. For the rule in Alabama see *Einstein v. Marshall*, 58 Ala. 153.

will serve to make the application of these remarks clear: If a person assume to act for another in respect of a matter over which he has no authority, he renders himself liable for misrepresentation to the person whom he may thus have misled, though he may have honestly believed that he had the authority assumed.<sup>1</sup> The matter of his authority was a fact peculiarly within his own means of knowledge, and it was therefore his duty to acquaint himself with the situation. And this matter of representations of authority has sometimes received a pretty wide interpretation.<sup>2</sup>

143. Cases falling under this phase of the subject appear however, apart from questions of authority or agency, and other cases of warranty,<sup>3</sup> to stand upon narrow ground, and the principle of liability is not to be extended to cases not clearly within it. Thus the fact that a person allows his name to be used as director or trustee of a corporation or other company, in prospectuses containing false representations, does not impose upon him in law the duty to know the truth of the statements, and so subject him to liability. To prove such fact is not in any sense to prove fraud.<sup>4</sup>

144. What creates the duty to know the facts, in other cases than ordinary warranty, is a difficult question to answer. The following rule, laid down by an Irish judge, **What creates duty to know.** is all perhaps that the nature of the case permits:

<sup>1</sup> *Conant v. Alvord*, 166 Mass. 311; *Jefts v. York*, ut supra; *White v. Madison*, ut supra; *Mahurin v. Harding*, 28 N. H. 128; *Noyes v. Lovering*, 55 Maine. 403; *Collen v. Wright*, 8 El. & B. 647, 658; *Coventry's Case*, 1891, 1 Ch. 202, 211. The term 'warranty' here is conventional. See also *Randell v. Trimen*, 18 C. B. 786; *Firbank v. Humphreys*, 18 Q. B. D. 54; *Seton v. Lafone*, 19 Q. B. D. 68. The majority in *Collen v. Wright* would, possibly, have agreed that an action for deceit could have been maintained. See *Jefts v. York*.

<sup>2</sup> See *May v. Western Union Tel. Co.*, 112 Mass. 90, which goes to the verge of interpretation. When the facts supposed to create the authority are fully stated, and no warranty is created, the plaintiff has taken his own risk. *Newmann v. Sylvester*, 42 Ind. 106.

<sup>3</sup> See e. g. *French v. Vining*, 102 Mass. 132, sale of food for cattle; *Jeffery v. Bigelow*, 13 Wend. 518.

<sup>4</sup> *Morgan v. Skiddy*, 62 N. Y. 319; *Western Bank v. Addie*, L. R. 1 H. L. Sc. 145.

What a man must know, it was in substance declared, must have regard to his particular means of knowledge, and to the nature of the representation; and this must be subject to the test of the knowledge which a man, paying that attention which every one owes to his neighbor in making a representation to be acted upon, would have acquired in the particular case by the use of such means.<sup>1</sup>

*Read to - 83.*

#### § 4. OF PLAINTIFF'S IGNORANCE OF FALSITY.

**145.** The next element of the breach of duty is that requiring the plaintiff to show that he was ignorant of the truth of the matter concerning which the representation was made, and believed that it was true.

**146.** Both of these situations must, in general, be true of the plaintiff; he must have been ignorant of the true state of things, and have trusted the representation of them as made by the defendant. He must have been deceived; and to render the defendant liable, the plaintiff must have been deceived by the defendant. If the plaintiff had knowledge of the facts in question, or if without having knowledge thereof he acted upon independent information, and not upon a belief of the truth of the defendant's representation, he is in the one case not deceived at all,<sup>2</sup> and in the other is not deceived by the person of whom he complains.

**147.** Should a purchaser of property therefore make all desired investigation of his own in regard to the truth of representations made by the vendor, he would find it hard to show that the latter deceived him by false representations.

**148.** More than this, if in such a case there was no warranty, the purchaser will not be allowed to say that the vendor concealed facts of importance from him; provided nothing was done or said to prevent the purchaser from making as ample investigation as he chose. For example:

<sup>1</sup> Doyle v. Hort, 4 L. R. Ir. 661, 670. Palles, C. B.

<sup>2</sup> Hager v. Grossman, 31 Ind. 223; Tuck v. Downing, 76 Ill. 71; Whiting v. Hill, 23 Mich. 399.

The defendant, vendor of a large tract of land, represents the estate to contain only fifty or sixty acres of untillable soil, and the plaintiff, the purchaser, before the sale, examines all the land more than once. The defendant is not guilty of a breach of duty to the plaintiff, though it turns out that the estate contains three hundred acres unfit for cultivation.<sup>1</sup>

149. Aside from such cases, there are few cases in which the plaintiff, if he was actually ignorant of the true state of facts and supposed the representation to be true, **Imputation of knowledge.** is treated by the law as though he had knowledge of the facts; any duty resting upon him being, at the most, only a general duty of diligence, rather than a duty, like that in the preceding section, towards the opposite party. The imputation of knowledge is then of much lessened force; it is generally indeed reduced to a case of presumptive evidence, if it arises at all.

150. It has often been laid down however that if the means of knowledge be equally open to both parties, the plaintiff, as a prudent man, must be deemed to **Means of knowledge.** have availed himself of such means (or is not to be excused if he has not done so), and hence that, in contemplation of law, he has not been deceived by the defendant's misrepresentation; the result being that, unless there was a warranty, no action can be maintained.<sup>2</sup> There is indeed no liability in any case in which the party complained of has made no misrepresentation, has not been guilty of fraud of any kind, and has made no warranty. 'Caveat emptor.' But for the broad doctrine before stated, there is little support in the more recent specific adjudications upon the subject.

151. Some courts however have come to draw a distinction between means of knowledge *at hand* and general means

<sup>1</sup> *Halls v. Thompson*, 1 *Smedes & M.* 413.

<sup>2</sup> *Vernon v. Keys*, 12 *East*, 632; *Slaughter v. Gerson*, 13 *Wall.* 379, dictum; *Messer v. Smith*, 59 *N. H.* 41; *Leavitt v. Fletcher*, 60 *N. H.* 182; *Lytle v. Bird*, 3 *Jones*, 222; *Fields v. Rouse*, *id.* 72; *Harrington v. Paterson*, 124 *Calif.* 542 (rescission); *West End Co. v. Claiborne*, 97 *Va.* 734.

of knowledge, in cases of misrepresentation; enforcing the doctrine in question where the means are at hand, so that by reasonable diligence the truth could be ascertained. For example: The plaintiff buys a quantity of manufactured rubber goods from the defendant at the defendant's factory. The defendant makes false representations, but no warranty, in regard to the goods, and the plaintiff, because of the representations, does not examine them specially, though they are at hand and in condition to be examined. It is held that the plaintiff cannot recover damages.<sup>1</sup>

152. Even this doctrine can hardly be considered as acceptable generally, in the light of most of the recent authorities as distinguished from the mere dicta of the books. It may be hard to believe that a plaintiff did not avail himself of means of knowledge directly at hand; but there is in principle, and by authority, at most only a probability of fact to be overcome even in such a case. There is, by the better rule, no conclusion of law either that the plaintiff availed himself of the means, or that it was his duty to do so; the plaintiff may still show that he was misled by the defendant's representation.<sup>2</sup> For example: A prospectus of a company in process of formation falsely states that the capital stock is a certain sum, and the plaintiff is induced by this statement to subscribe for shares of stock in the company. The plaintiff might have learned the true state of things by examining the records of the company, which were open to his inspection,

<sup>1</sup> *Salem Rubber Co. v. Adams*, 23 Pick. 256. See *Brown v. Leach*, 107 Mass. 364; *Cases*, 33 and note; *Whiting v. Price*, 172 Mass. 240, Holmes, J.: 'But the requirement as it has been worked out [in Massachusetts] does not call for more than reasonable diligence.' See also *Housacle v. Ruffin*, 172 Mass. 420; *West End Co. v. Claiborne*, 97 Va. 734.

<sup>2</sup> *Mead v. Bunn*, 32 N. Y. 275, 280; *Schwenk v. Naylor*, 102 N. Y. 683; *Linington v. Strong*, 107 Ill. 295; *Weber v. Weber*, 47 Mich. 569; *West v. Wright*, 98 Ind. 335; *McClellan v. Scott*, 24 Wis. 81, 87; *Griffith v. Hanks*, 46 Texas, 217; *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99, 120; *Smith v. Land & House Corp.*, 28 Ch. Div. 7; *Redgrave v. Hurd*, 20 Ch. Div. 1, 13; *Reynell v. Sprye*, 1 De G. M. & G. 668, 709; *Stanley v. McGauran*, 11 L. R. Ir. 314; *Sankey v. Alexander*, Ir. R. 9 Ex. 259, 316.



but did not make the examination. He is not barred of redress.<sup>1</sup> Again: The defendant, vendor of land, makes to the plaintiff false representations concerning his title to the land. An examination of the public registry would disclose the truth. The plaintiff may rely upon the representations, and need not go to the registry.<sup>2</sup>

153. The subject may be further illustrated by a quite different sort of case. Every man is presumed to know the contents of a written contract signed by him; but no presumption of knowledge will stand in the way of a charge of misrepresentation or other fraud in regard to the contents of the writing.<sup>3</sup> No doubt it would be imprudent not to read or to require the reading of an instrument before signing or accepting it; indeed, the courts would turn a deaf ear to a man who sought to get rid of a contract solely on the ground that its terms were not what he supposed them to be. But the case would be different where a plaintiff charged fraud upon the defendant in reading the contract to him, or in stating its terms, or in secretly inserting terms not agreed upon.<sup>4</sup>

Contents of  
written in-  
strument:  
rescission.

154. The usual course of proceeding in regard to cases of the kind now under consideration is to rescind the contract;

<sup>1</sup> *Central Ry. v. Kisch*, supra.

<sup>2</sup> *Parham v. Randolph*, 4 How. (Miss.) 435; *Kiefer v. Rogers*, 19 Minn. 32; *Holland v. Anderson*, 38 Mo. 55. See *Rhode v. Alley*, 27 Texas, 443.

Perhaps however, because of the time and expense possibly to be incurred, the registry would not be considered as at hand, so as to be immediately available for verification. A fortiori, of parties in Massachusetts in regard to the Patent Office at Washington. *David v. Park*, 103 Mass. 501. So too of a piece of land covered with snow: *Martin v. Jordan*, 60 Maine, 531; *Rhode v. Annis*, 75 Maine, 17; or flooded: *Jackson v. Armstrong*, 50 Mich. 65. Upon this whole subject of means of knowledge see *Bigelow, Fraud*, i. 522 et seq.

<sup>3</sup> *Albany Inst. for Savings v. Burdick*, 87 N. Y. 40; *Robinson v. Glass*, 94 Ind. 211; *Hawkins v. Hawkins*, 50 Cal. 556; *Schuykill v. Copley*, 67 Penn. St. 386; *Martindale v. Harris*, 26 Ohio St. 379; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Stanley v. McGauran*, 11 L. R. Ir. 314.

<sup>4</sup> *Albany Inst. for Savings v. Burdick*, supra; *Stanley v. McGauran*, supra.

but such a course may have become impossible.<sup>1</sup> And whether it be possible or not, it is a well-established rule of law that one who has been induced by fraud to enter into a contract, whether executory or wholly (as by sale and payment) executed, may treat the contract as binding, retain its fruits, and sue for the fraud by which it was effected.<sup>2</sup> Hence in the case of a written contract knowingly misread, misstated, or miswritten, the party wronged may (probably) maintain an action of deceit for the damage he may have incurred, while at the same time treating the contract as in itself valid.

155. But the defendant must have been guilty of fraud, as by knowingly misreading or misstating the instrument. Should he profess to state no more than the effect of a long writing, he could not, it seems, be liable in damages for a mistake; though equity would reform the instrument at the instance of the party injured.

156. The explanation of all this is not far to seek. It is not for a person who admits that he has been guilty of endeavoring to mislead another by misrepresentation, to say to him, when called to account, 'You ought not to have trusted me; you were negligent; you ought to have made inquiry.'<sup>3</sup> The law requires indeed the exercise of prudence by both parties; but that is all. If prudence on the one side has been disarmed by misrepresentation on the other, the law cannot justly refuse relief. Besides, the case of a plaintiff so situated is quite different from that of a defendant so related to the facts as to be bound to know the truth. In this latter case no one has

Prudence disarmed by misrepresentation.

<sup>1</sup> See *Clarke v. Dickson*, El. B. & E. 148.

<sup>2</sup> *Strong v. Strong*, 102 N. Y. 69; *Gould v. Cayuga Bank*, 86 N. Y. 75; *Whitney v. Allaire*, 4 Denio, 554; s. c. 1 Comst. 305; *Mallory v. Leach*, 35 Vt. 158; *Clarke v. Dickson*, supra; *Regina v. Saddlers' Co.*, 10 H. L. Cas. 404, 421; *Western Bank v. Addie*, L. R. 1 H. L. Sc. 167.

<sup>3</sup> *Albany Inst. for Savings v. Burdick*, 87 N. Y. 40; *Smith v. Land and House Corporation*, 28 Ch. Div. 7; *Cases*, 26; *Speed v. Hollingsworth*, 38 Pac. R. 496 (Kans.). But see *Brady v. Finn*, 162 Mass. 260; *Holst v. Stewart*, 161 Mass. 516; *Whiting v. Price*, 172 Mass. 240.



misled the defendant; in the case under consideration the misrepresentation has, upon the hypothesis, misled the plaintiff.

157. The case is not varied in law by the circumstance that the plaintiff may have made some partial examination on his own behalf; if still he was misled, and prevented from making such examination as otherwise he would have made, he will be entitled, so far, to recover.<sup>1</sup> For example: Representations concerning a hotel about to be sold at auction are made by the seller in printed particulars of sale. The buyer, having seen the statements, sends his agent to look over the premises to see whether it will be advisable to buy. The agent goes accordingly, and having made examination, makes an unfavorable report; but the purchase is made. The buyer may show that he was induced by the representations of the seller to buy.<sup>2</sup>

158. The case will of course be different if the defendant's representation was not of a nature to mislead, as where it is a statement of mere opinion, or if it did not in fact mislead. And where the facts are open to the plaintiff equally with the defendant, it will no doubt be more difficult than in other cases for the plaintiff to show that he was prevented, by the representation made to him, from availing himself of the means of inquiry.

159. When the defendant induces the plaintiff to abstain from seeking information, mere concealment of material facts may become a breach of duty; and redress will not be refused in such a case merely because a sharp business man might not have been deceived. Nor is the rule of law different when the defendant suggests examination to the plaintiff, but in such a way as to indicate that such a step would be quite unnecessary. For example: The defendant, in selling to the plaintiff property at a distance, suggests to the plaintiff that he go and

Partial examination.

Representation not of a nature to mislead.

When concealment is a breach of duty.

<sup>1</sup> Cases first cited in note 3, p. 76.

<sup>2</sup> *Smith v. Land and House Corporation*, *supra*.

look at the property, 'as their judgment might not agree, and, if not satisfied, he would pay the plaintiff's expenses, but if satisfied the plaintiff should pay them himself.' This is deemed to justify the plaintiff in acting upon the defendant's representations without examining the property.<sup>1</sup>

**160.** Even though a party sell at the risk of the purchaser, 'with all faults,' as he may, he will have no right to practise fraud; and if he should do so he will be liable as **Sale with faults.** for a breach of his legal duty to the purchaser. For example: The defendant sells to the plaintiff a vessel, 'hull, masts, yards, standing and running rigging, with all faults, as they now lie.' He however makes a false statement, that the 'hull is nearly as good as when launched,' and takes means to conceal defects which he knew to exist. This is a breach of duty to the plaintiff.<sup>2</sup> But the case would be different if the seller, though aware of the defects, should do nothing to conceal them.<sup>3</sup>

**161.** When the parties, by reason of physical or mental infirmity on the one side, or of the fact that the one party is **Inequality of parties.** in the occupation or management of the other's business, or has the general custody of his body, do not stand upon an equal footing, the objection to a suit for false representations, that the party to whom they were made was negligent in not making inquiry or examination, has still less force. Examples of this class of cases may be readily found in the case of transactions with aged persons, or with cestuis que trust by trustees, or with wards by guardians.<sup>4</sup>

**162.** Not even the subsequent acts of accepting and paying for goods upon delivery will bar the purchaser of redress,

<sup>1</sup> Webster v. Bailey, 31 Mich. 36.

<sup>2</sup> Schneider v. Heath, 3 Campb. 506. See Whitney v. Boardman, 118 Mass. 242, 247; George v. Johnson, 6 Humph. 36.

<sup>3</sup> Baglehole v. Walters, 3 Campb. 154 (overruling Mellish v. Motteux, Peake, 156); Pickering v. Dowson, 4 Taunt. 779; Bywater v. Richardson, 1 Ad. & E. 508.

<sup>4</sup> See ante, p. 65.

though the goods were open to his inspection at the time, if the fraud was not then discovered, and especially if such acceptance and payment were procured by fraudulent artifices on the part of the vendor.<sup>1</sup> For example: The defendant, a manufacturer and vendor of tobacco, knowingly uses damaged tobacco in the manufacture, and intentionally uses boxes of green lumber; and while the tobacco is being made up he exhibits to the plaintiff from time to time, in order to mislead him, specimens of tobacco as of the kind he (the defendant) is supplying the plaintiff, when in fact the defendant is supplying him with a different and inferior kind. Notwithstanding acceptance of the goods and payment for them, the plaintiff is entitled to damages against the defendant.<sup>2</sup>

Acceptance of  
goods sold in  
fraud of  
buyer.

#### § 5. OF THE INTENTION THAT THE REPRESENTATION SHOULD BE ACTED UPON.

163. In regard to that element of the breach of duty under consideration which requires the plaintiff to prove that the defendant intended his representation to be acted upon, it is to be observed that, while the rule is probably inflexible, its force appears chiefly in those cases in which the deception was practised with reference to a negotiation with a third person, and not with the defendant. In cases of that kind, an instance of which is found in false representations to the plaintiff of the solvency of a third person,<sup>3</sup> it is plain that the transaction with such third person, though shown to have been caused by the defendant's false representation, affords no evidence of an intention in the defendant that the representation should be acted upon by the plaintiff. It would be perfectly consistent with mere evidence that the plaintiff acted upon the defendant's misrepresentation in a transaction with a third person,

Misrepresentation in regard to third persons.

<sup>1</sup> See *Clarke v. Dickson*, El. B. & E. 148.

<sup>2</sup> *McAroy v. Wright*, 25 Ind. 22. An act does not amount to the waiver of a wrong unless it be done with knowledge of the wrong.

<sup>3</sup> *Pasley v. Freeman*, 3 T. R. 51; Cases, 1.

that the defendant, though he knew the falsity of his representation, did not know, and had no reason to suppose, that the plaintiff would act upon it. The representation might, for all this, have been a mere idle falsehood, such as would not justify any one in acting upon it.

164. It follows that where a party complains of false representations, whereby he was caused to suffer damage in a transaction with some third person, it devolves upon him to give express evidence either that the defendant intended that he should act upon the representation, or the legal equivalent, that the plaintiff was justified in inferring such intention;<sup>1</sup> and that it is not enough to prove that the misrepresentation was made with knowledge of its falsity.<sup>2</sup>

165. When however the effect of the false representation was to bring the plaintiff into a business transaction with the defendant, the case is quite different. Proof of such a fact shows at once the intent of the defendant to induce the plaintiff to act upon the representation; and it follows that no evidence need be offered of an intention to that effect, or of reasonable ground to suppose an intention. The principle appears most frequently in cases of sales; the rule of law being, that if the plaintiff, the purchaser, establish the fact that the defendant, the vendor, knew that his representation was false, it is not necessary for the plaintiff to give further evidence to show that the defendant intended to induce the plaintiff to buy.<sup>3</sup> For example: The defendant sells a horse to the plaintiff representing that it is sound, when he knows that it is not. Further evidence of intention is not necessary.<sup>4</sup>

Bargain between plaintiff and defendant.

<sup>1</sup> See *Freeman v. Cooke*, 2 Ex. 654; *Cornish v. Abington*, 4 H. & N. 549.

<sup>2</sup> See *Pasley v. Freeman*, 3 T. R. 51; Cases, 1.

<sup>3</sup> *Collins v. Denison*, 12 Met. 549; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81; *Johnson v. Wallower*, 15 Minn. 474; s. c. 18 Minn. 288; *Foster v. Charles*, 6 Bing. 396; s. c. 7 Bing. 105; *Polhill v. Walter*, 3 B. & Ad. 114.

<sup>4</sup> *Collins v. Denison*, *supra*.

166. Indeed, it is not necessary in any case, if the cause of action is carefully stated, that it should appear that the defendant intended to *injure* the plaintiff. It has already been stated that a person honestly professing to have authority to act for another is liable as if for fraud for the damages sustained, if he has not the authority.<sup>1</sup> In such cases it is obvious that the representation may have been made for the benefit of the plaintiff.<sup>2</sup> So too in cases in which the defendant has made the misrepresentation with knowledge of its falsity, it is plain that he may really have desired and expected that the plaintiff would derive a benefit from the transaction. The law requires proof of intention (or the equivalent), not because it is supposed to be necessary to prove a *motive* on the part of the defendant, but to show that he understood the position of the plaintiff as a person likely to be misled. It is in that way only that intention is an element in the breach of duty. Proof of malice will serve the purpose, but is not required.

Intent to injure not necessary.

## § 6. OF ACTING UPON THE REPRESENTATION.

167. It is fundamental that the defendant's representation should have been acted upon by the plaintiff, and acted upon to his injury, to enable him to maintain an action for the alleged breach of duty.<sup>3</sup> Indeed, fraudulent conduct or dishonesty of purpose, however explicit, will not afford a cause of action unless shown to be the very ground upon which the plaintiff acted to his damage.<sup>4</sup> The *defendant* must have caused the damage.

Representation must be acted upon to plaintiff's damage.

168. So strong is the rule upon this subject that it is deemed necessary to this action that the damage as well as the acting upon the representation must already have been suffered before

<sup>1</sup> Ante, p. 71.

<sup>2</sup> See *Polhill v. Walter*, 3 B. & Ad. 114.

<sup>3</sup> *Pasley v. Freeman*, 3 T. R. 51; *Smith v. Chadwick*, 9 App. Cas. 187; *Freeman v. Venner*, 120 Mass. 424.

<sup>4</sup> *Rutherford v. Williams*, 42 Mo. 18.

the bringing of the suit, and that it is not sufficient that it may occur. For example: The defendant induces the plaintiff to indorse a promissory note before its maturity by means of false and fraudulent representations. An action therefor cannot be maintained before the plaintiff has been compelled to pay the note.<sup>1</sup>

169. A person who has been prevented from effecting an attachment upon property by the fraudulent representations of the owner or of his agent is deemed to have suffered no legal damage thereby, though subsequently another creditor attach the whole property of the debtor and sell it upon execution to satisfy his own debt.<sup>2</sup> The person thus deceived, having acquired no lien upon or right in the property, cannot lose any by reason of the deceit. The most that can be said of such a case, it has been observed, is that the party intended to attach the property, and that this intention has been frustrated;<sup>3</sup> and it could not be certainly known that that intention would have been carried out.<sup>4</sup> If the attachment had been already levied and was then lost through the deceit, the rule would of course be different.<sup>5</sup>

170. It must appear moreover that the *plaintiff* was entitled to act upon the representation; and this will depend upon the intention, or the reasonably presumed intention, of the defendant. The representation may have been intended for (1) one particular individual only (in which case he alone is entitled to act upon it), or (2) it may have been intended for any one of a class, or (3) for any one of the public, or (4) it may have been made to one person to be communicated by him to another. Any one so intended, who has acted upon the misrepresentation to his damage, will be entitled to redress for any damage sus-

Who may act  
on the repre-  
sentation.

<sup>1</sup> Freeman v. Venner, 120 Mass. 424.

<sup>2</sup> Bradley v. Fuller, 118 Mass. 239. But see Kelsey v. Murphy, 26 Penn. St. 78.

<sup>3</sup> Id.; Lamb v. Stone, 11 Pick. 527.

<sup>4</sup> Bradley v. Fuller, *supra*.

<sup>5</sup> Id.



tained by acting upon the representation.<sup>1</sup> For example: The defendants put forth a prospectus to the public, containing false representations, for the purpose of selling shares of stock in their company. The plaintiff, as one of the public, may show that he acted upon the representations, and, having bought stock accordingly, recover damages for the loss sustained thereby.<sup>2</sup>

*End Moore Jan 8.*

*omit to § 175* § 7. OF KINDRED WRONGS: QUASI-DECEIT: UNFAIR COMPETITION.

171. We come now to certain kindred wrongs, which may be called quasi-deceit. These vary somewhat in legal aspect from deceit proper as presented in the foregoing pages, and yet they have enough in common with that subject to be treated as kindred to it. The subjects referred to are (1) the simulation of another's 'trade name' or business sign, and (2) disparaging statements of another's property, otherwise called Slander of Title. But Slander of Title introduces malice, and is a distinct tort; it will accordingly have a separate chapter.

Fraudulent  
use of trade  
name or busi-  
ness sign.

172. A trademark proper is a mark or device, registered under statute, to identify a man's goods offered for sale or not. The owner of a valid statutory trademark has *property* in the same, with right of protection accordingly; his right accordingly does not turn upon the practice of fraud, or anything in the nature of fraud, and hence is not a subject for consideration here.<sup>3</sup> By 'trade name' is meant a name, mark, or device not registered according to statute and not a subject of property in the plaintiff. No action therefore can be based upon any infringement of a property right; there must be simulation, together with deception, practised by the de-

<sup>1</sup> Richardson v. Silvester, L. R. 9 Q. B. 34; Swift v. Winterbotham, L. R. 8 Q. B. 244; Peek v. Gurney, Law R. 6 H. L. 377.

<sup>2</sup> Andrews v. Mockford, 1896, 1 Q. B. 372, distinguishing Peek v. Gurney, L. R. 6 H. L. 377. See also New York R. Co. v. Schuyler, 34 N. Y. 30; Bruff v. Mali, 36 N. Y. 200, 205.

<sup>3</sup> See post, p. 275.



fendant on the public against the plaintiff.<sup>1</sup> The wrong is often called 'unfair competition.' The trade name or mark may be one already in use and known to the trade as the name or mark of a particular person, or it may be new.

173. In order to sustain an action for *damages* for alleged wrongful use of a trade name, the plaintiff must show (1) that the trade name used by the defendant so resembled that of the plaintiff as to be likely to deceive the ordinary buyer, (2) that the defendant knew of the existence of the plaintiff's mark when he committed the alleged wrong, (3) that he intended to palm off the goods as the goods of the plaintiff, and (4) that the public were deceived thereby to the plaintiff's hurt.<sup>2</sup> For example: The defendant sells a medicine labelled 'Dr. Johnson's ointment;' the label being one which the plaintiff had previously used, and was still using when the defendant began to make use of the same. The plaintiff cannot recover without showing that the defendant has used the label for the purpose of indicating that the medicine has been prepared by the plaintiff.<sup>3</sup> Again: The plaintiff Sykes is a maker of powder-flasks and shot-belts, upon which he has placed the words 'Sykes Patent.' There is no valid patent upon them, in fact, as has been decided by the courts; but the maker has continued to use the words upon the goods to designate them as of his own making. The defendant, whose name is also Sykes, makes similar

What must  
be proved in  
the case of a  
trade name.

<sup>1</sup> See *Reddaway v. Banham*, 1896, A. C. 199; *Ratcliffe v. Evans*, 1892, 2 Q. B. 521, 528, as to damage.

<sup>2</sup> *Sykes v. Sykes*, 3 B. & C. 541; Cases. 55; *Rodgers v. Nowill*, 5 C. B. 109; *Morison v. Salmon*, 2 Man. & G. 385; *Crawshaw v. Thompson*, 4 Man. & G. 357, 379, 383. See *Bigelow*, *Fraud*, i. 560, 565. In a proceeding for *injunction* it is not necessary, even in these cases of quasi-trademark, to prove the defendant's knowledge or intent to deceive. Simple priority of use of the mark is enough. See *Millington v. Fox*, 3 Mylne & C. 338; *Singer Machine Co. v. Wilson*, 3 App. Cas. 376; *Reddaway v. Bentham Hemp-spinning Co.*, 1892, 2 Q. B. 639, 644, 646. The subject of trademarks is being assimilated to the law of property, as trademarks proper are taking the place of mere trade names; and actions for deceit are becoming infrequent.

<sup>3</sup> *Singleton v. Bolton*, 3 Doug. 293. This supposes, of course, that the medicine was not patented.

goods, and puts upon them the same words, with a stamp closely resembling that of the plaintiff, and thus sells the goods 'as and for' the plaintiff's goods. This is a breach of duty.<sup>1</sup>

174. If the case be one of alleged wrongful conduct in the use of a business sign or badge likely to deceive, the proof required will be the same, except that, instead of the 'palming off' under (3), the plaintiff, to recover damages, must show that the defendant <sup>Wrongful use of business sign.</sup> intended to represent that the business which he was carrying on was the plaintiff's business, or business in which the plaintiff had some special interest. For example: The defendant has the words 'Revere House' painted upon coaches which he uses to carry passengers from the railroad station to a hotel of the name. By contract with the proprietor of the hotel, the plaintiff has the exclusive right to represent that he has the patronage of the hotel. The defendant commits no breach of duty to the plaintiff, unless he so makes use of the designation as to indicate that the proprietor of the hotel has granted to him what has been granted to the plaintiff alone.<sup>2</sup>

<sup>1</sup> Sykes v. Sykes, *supra*.

<sup>2</sup> Marsh v. Billings, 7 Cush. 322; Cases, 47. When an *injunction* merely is asked for by one who has lawfully had use of an unregistered name or mark, known to the trade, it is not necessary, any more than it is of the case of a legal, registered trademark, for such one to prove an intent on the part of the defendant to palm off his goods as the goods of the plaintiff; enough that the name or mark adopted by the defendant, from resembling that of the plaintiff, will be likely to deceive the ordinary buyer. Or to put it in language quoted and approved by the Circuit Court of Appeals of the United States: 'When such a mark, name, or phrase has been so used by a person in connection with his business or articles of merchandise as to become identified therewith and indicate to the public that such articles emanate from him, the law will prohibit others from using it in such a way as to lead purchasers to believe that the articles they sell are his, or as to obtain the benefit of the market he has built up thereunder.' Fuller v. Battle Creek Health Food Co., Cir. Ct. of Appeals, Second Circuit, 1900.

The same name or mark, so in use, may indeed be used by others, if it be not a true trademark of the statute; but in that case there must be a plain designation that the name or mark is that of the person using it, and not that of the plaintiff. Powell v. Birmingham Vinegar Co., 1894, 3 Ch. 449, 461; affirmed, 1897, A. C. 710.

## CHAPTER II.

### 2. *Lawful Acts done of Malice.*

#### SLANDER OF TITLE.

*Statement of the duty.* A owes to B the duty not to disparage B's property, to B's damage, by false and malicious representations.

Slander of title was the name originally of an action for false and disparaging representations in regard to the plaintiff's title to land; but in recent times the action and name have been extended to false and disparaging statements in regard to property of every kind, and that too whether the statements relate to title or to quality.<sup>1</sup>

#### § 1. OF THE DISTINCTION BETWEEN SLANDER OF TITLE AND DEFAMATION.

175. The only real connection the action has with actions for slander (or libel) is in the name the action bears and in the structure of the declaration, which in following the declaration in slander has followed a misleading analogy. The plaintiff in actions at law for slander of title has to prove that the statements are false, that they were made with actual malice, and that they have been followed by damage.<sup>2</sup> None of these things is required in

**What must be proved.**

<sup>1</sup> *Malachy v. Soper*, 3 Bing. N. C. 371; *Cases*, 40 (title to personalty); *Gott v. Pulsifer*, 122 Mass. 235 (quality of personalty, 'Cardiff Giant').

<sup>2</sup> *Gott v. Pulsifer*, 122 Mass. 235; *Cardon v. McConnell*, 120 N. C. 461; *Hopkins v. Drowne*, 21 R. I. 20; *Malachy v. Soper*, 3 Bing. N. C. 371; *Cases*, 40; *Pater v. Baker*, 3 C. B. 831, 868; *Kendall v. Stone*, 2 Sandf. 269 (reversed on another point 5 N. Y. 14); *Stark v. Chitwood*, 5 Kans. 141; *McDaniel v. Baca*, 2 Cal. 868. See *Mellin v. White*, 1894, 3 Ch. 276, C. A.

actions for slander, as will be seen. But the requirement of proof of malice differentiates the action also from deceit.

## § 2. OF THE ELEMENTS OF THE ACTION.

176. Of two of the elements of this action, the falsity of the representations and damage, it will be enough to refer to what has been said of the same things in the chapter on Deceit; there is no difference between the two wrongs in those particulars. In regard to malice too, what has been said in another place<sup>1</sup> may be referred to; but a word should be added here.

177. The malice which must be proved in slander of title is 'actual' malice, in the sense indeed of a state of the mind, but not necessarily in the sense of motive. It is no doubt true that to prove an evil motive for the false representations will (with damage) make a *presumptive* case of 'actual' malice in the sense of the rule, and that that would presumptively overturn the *permission* or privilege to make the false representations. — for it must be remembered that there can be no legal right to make such representations.<sup>2</sup> But still there is reason to believe that the effect of the evidence would be overturned by proof that the defendant believed what he said to be true and said it in good faith, however much he may also have wished to harm the plaintiff. A may make a false claim to property held by B, believing his claim to be true, and in good faith assert his intention to make good the claim, hoping at the same time to ruin B in the contest, in hatred of him.<sup>3</sup> At any rate it is laid down

<sup>1</sup> Ante, pp. 16-22.

<sup>2</sup> That the case is one of permission or privilege only, see *Gott v. Pulsifer*, 122 Mass. 235; *Halsey v. Brotherhood*, 19 Ch. D. 386; *Wren v. Weild*, L. R. 4 Q. B. 730.

<sup>3</sup> See *Wren v. Weild*, L. R. 4 Q. B. 730, 734, Blackburn, J., for the court: 'Where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and indeed in common fairness bound, to give the intended purchaser warning of such his intention. . . . And consequently we think no action can lie for giving such preliminary warning, unless either it can be shown that the threat was made *mala fide*, only with the intent to injure the vendor, and without any

that belief and good faith on the part of the defendant will be a defence to the *prima facie* case. For example: The defendant, to the damage of the plaintiff, falsely states to a third person, with whom the plaintiff has made a contract for the sale of certain lands, that the plaintiff's title to the property will 'sooner or later be contested;' that when the lands were sold to the plaintiff the vendor 'was not in a state of soundness or competency.' The defendant made this statement in good faith, believing it to be true. This is no breach of duty to the plaintiff.<sup>1</sup>

178. Further, though it is true that to prove an evil motive makes a presumptive case of the malice required, it is also true that the plaintiff is not bound to prove anything of the kind. It is well settled that it is enough for the plaintiff to prove that the defendant made the false representations with knowledge that they were false or in reckless disregard of the consequences of making them. For example: The plaintiff in his declaration alleges that the defendant made a claim falsely and maliciously and without probable cause, knowing that he had no claim, to goods of the plaintiff, to the plaintiff's damage. The declaration is good; knowledge of the baselessness of the claim would be sufficient evidence of malice.<sup>2</sup> Again: The defendant is sued in slander of title for publishing in a newspaper, of which he is proprietor, false and disparaging statements concerning a statue owned by the plaintiff, called the Cardiff Giant. The judge instructs the jury that the plaintiff must prove that the statements were made with a disposition wilfully and purposely to injure the value of the statue, with wanton disregard of the

purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful.' The qualifying words 'unless . . . purchaser' plainly imply that if there was a real purpose to follow up the claim by an action, it would not matter that the claim was also made to injure the plaintiff.

<sup>1</sup> *Pitt v. Donovan*, 1 Maule & S. 639; *Wren v. Weild*, *supra*.

<sup>2</sup> *Green v. Button*, 2 Crompt. M. & R. 707; *Wren v. Weild*, L. R. 4 Q. B. 730, 734.

interest of the owner. The instruction is erroneous; the plaintiff need only prove that the statements were made with a reckless disregard of the plaintiff's rights and of the consequences to him.<sup>1</sup>

179. It will accordingly be noticed that what is required in the name of malice in the law of slander of title is satisfied by proof of what is called fraud, in the narrower sense, in the law of deceit, to wit, knowledge of falsity, or falsity with recklessness of consequences.<sup>2</sup> Whether the other methods of proving fraud in deceit<sup>3</sup> would satisfy the law of slander of title in regard to malice does not appear. But it is clear that fraud and malice are not synonymous terms. Fraud taken in its broad sense signifies something more than a state of mind; as we have elsewhere seen, it imports means employed, while malice as an entity, in whatever sense, is only a state of the mind.

Relation of  
fraud to  
malice.

180. But though the term 'fraud,' as the word is commonly used in deceit, is here an interchangeable term with malice, and though in regard to falsity and damage deceit and slander of title are in accord, that is all that can be said. At that point we come to an end of slander of title, but not of deceit. Several other elements of liability would be required to make a case of deceit, which in the nature of things could not belong to the present wrong, — ignorance of the plaintiff and intention that the plaintiff should act upon the misrepresentations. Slander of title has therefore a place of its own in the law of torts.

<sup>1</sup> *Gott v. Pulsifer*, 122 Mass. 235, Gray, C. J.: 'Malice in uttering false statements may consist either in a direct intention to injure another or in a reckless disregard of his rights and of the consequences that may result to him.' *Moore v. Stevenson*, 27 Conn. 14; *Hibbs v. Wilkinson*, 1 F. & F. 608, 610; *Paris v. Levy*, 2 F. & F. 71, 74; s. c. 9 C. B. N. S. 342, 350; *Strauss v. Francis*, 4 F. & F. 1107, 1114. See also *Scripps v. Reilly*, 35 Mich. 371.

<sup>2</sup> *Ante*, p. 69.

<sup>3</sup> *Id.*



## CHAPTER III.

### 2. *Lawful Acts done of Malice, continued.*

#### MALICIOUS PROSECUTION.

*Statement of the duty.* A owes to B the duty not to institute against him a prosecution, with malice and without reasonable and probable cause, for an offence falsely charged to have been committed by B.

When a termination of prosecution is referred to without further explanation, such a termination is meant as will, in connection with the other elements of the action, permit an action for malicious prosecution.

The word 'prosecution' includes such civil actions as may be the subject of a suit for malicious prosecution.

The term 'probable cause' is used for brevity, in this chapter, for 'reasonable and probable cause.'<sup>1</sup>

#### § 1. WHAT MUST BE PROVED.

181. In order to maintain an action for a malicious prosecution, three things are necessary, and sometimes four, to wit, (1) the prosecution complained of must have terminated before the action for redress on account of it is begun; (2) it must have been instituted without probable cause; (3) it must have been instituted maliciously;<sup>2</sup> (4) actual damage must be proved in cases in which the charge in itself would not be actionable, assuming that an action for malicious

<sup>1</sup> There may be some slight difference in meaning in special cases, between 'reasonable' and 'probable' cause. See the language of Tindal, C. J., in *Broad v. Ham*, 5 Bing. N. C. 722, 725, quoted in *Lister v. Perryman*, L. R. 4 H. L. 521, 530, 540. Ordinarily however the words are synonymous.

<sup>2</sup> *Ellis v. Simonds*, 168 Mass. 316, 325; *Vanderbilt v. Mathis*, 5 Duer, 304; *Cases*, 58; *Hagelund v. Murphy*, 54 Neb. 545.

prosecution is maintainable in such a case. And it devolves upon the plaintiff to prove all these facts.

182. Actions for malicious prosecution are brought, for the greater part, only for wrongful criminal prosecutions. For civil suits instituted of malice and without probable cause the tendency of policy appears to be Wrongful civil suits. against giving redress universally.<sup>1</sup> It is given however in cases of actions involving charges of 'scandal to reputation or the possible loss of liberty,'<sup>2</sup> such as 'proceedings in bankruptcy against a trader, or the analogous process of a petition to wind up a company,'<sup>3</sup> and cases in which property has been attached maliciously and without probable cause, but professedly under attachment laws, or has been thus taken in replevin,<sup>4</sup> and the like. But where there has been a wrongful arrest, there is ground for a suit for false imprisonment, though there may be none for malicious prosecution.<sup>5</sup>

## § 2. OF THE TERMINATION OF THE PROSECUTION.

183. The action for a malicious prosecution is given for the preferring in court of a *false* charge, maliciously and without proper grounds. And, as it cannot be known by satisfactory evidence whether the charge is true or false before the verdict and Reason for requiring termination of prosecution.

<sup>1</sup> The rule in England is very clear. 'In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.' *Quartz Hill Mining Co. v. Eyre*, 11 Q. B. Div. 674, 690, Bowen, L. J. But there are some exceptions, as in cases involving false imputations touching business reputation. See *id.* p. 691. Actions for malicious civil suits are not limited in this country by any definite restriction. See *Closson v. Staples*, 42 Vt. 209; *Cincinnati Tribune Co. v. Bruck*, 61 Ohio St. 489; *Coal Co. v. Upson*, 40 Ohio St. 17; *Pope v. Pollock*, 46 Ohio St. 367; *Cardinal v. Smith*, 109 Mass. 158; *Bicknell v. Dorion*, 16 Pick. 478, 488-490.

<sup>2</sup> 11 Q. B. Div. 691, Bowen, L. J.; *Pollock, Torts*, 279, 2d ed.

<sup>3</sup> *Pollock*, 279; 11 Q. B. Div. 691.

<sup>4</sup> *Fortman v. Rottier*, 8 Ohio St. 548. See *O'Brien v. Barry*, 106 Mass. 300; *Johnson v. King*, 64 Texas, 226

<sup>5</sup> Chapter ix.

judgment of the court trying the cause, it is deemed necessary for the defendant to await the termination of the proceeding before instituting an action for malicious prosecution. Or, as the reason has more commonly been stated, if the suit for the alleged malicious prosecution should be permitted before the prosecution itself is terminated, inconsistent judgments might be rendered, — a judgment in favor of the plaintiff in the action for the prosecution, and a judgment against him in that prosecution;<sup>1</sup> and it is often said that judgment against the party prosecuted, would show, and that conclusively, that there was probable cause for the prosecution.<sup>2</sup>

184. It will be seen in the next section (relating to probable cause) that this is an unsound view of the effect of the judgment.<sup>3</sup> But since conviction would show that the charge was not false, the prosecution could not have been wrongful; the person prosecuted has now to prove that he was not guilty,<sup>4</sup> — conviction shows that he was guilty.

185. Conviction is fatal even though the prosecution take place in a proceeding from which there is no appeal. Conviction in such a case is equally fatal with a conviction in a tribunal from the judgment of which the defendant has a right of appeal; since to allow the action for malicious prosecution would be (so it is deemed) virtually to grant an appeal. For example: The defendant procures the plaintiff to be arrested (falsely, maliciously, and without probable cause, as the latter alleges) and tried before a justice of the peace on a criminal complaint of assault and battery. The plaintiff

<sup>1</sup> *Fisher v. Bristow*, 1 Doug. 215.

<sup>2</sup> *Parker v. Farley*, 10 Cush. 279, 282; *Dennehey v. Woodsum*, 100 Mass. 195, 197; *Morrow v. Wheeler & W. Manuf. Co.*, 165 Mass. 349; *Castrique v. Behrens*, 3 El. & E. 709. See *Bes     v. Matthews*, L. R. 2 C. P. 684; 1 *Smith's Leading Cases*, 258, 6th ed.

<sup>3</sup> It is held in England, on sound principle, that an action for malicious prosecution against the present plaintiff, by proceedings against him in bankruptcy, may be maintained notwithstanding an adjudication against him, if this has been set aside. *Metropolitan Bank v. Pooley*, 10 App. Cas. 210. See also *Philpot v. Lucas*, 101 Iowa, 478, 480, 481.

<sup>4</sup> *Precedents in Chitty, Pleading*, .

(then defendant) is convicted, and no appeal is allowed by law. The defendant is not liable to an action for malicious prosecution.<sup>1</sup>

186. It is often said that the plaintiff must have been acquitted of the charge preferred, to enable him to sue for malicious prosecution. But this is not always true; it is not true of civil suits,<sup>2</sup> and of course it is not true of criminal proceedings in which there is no power of conviction or acquittal. Acquittal not necessary in certain cases.

187. It is not necessary to the termination of a civil suit, such as will permit an action for malicious prosecution, that the suit should have gone to actual judgment, or even to a verdict by the jury. A civil suit is entirely within the control of the plaintiff, and he may withdraw and terminate it at any stage; and, should he take such a step, the suit is terminated. For example: The defendant (in the suit for malicious prosecution) writes in the docket book, opposite the entry of the case against the plaintiff, 'Suit withdrawn.' This is a sufficient termination of the cause for the purposes of the now plaintiff.<sup>3</sup>

188. It is not necessary indeed that the party should make a formal entry of the withdrawal or dismissal of the suit, in order (without a judgment or verdict) to terminate it sufficiently for the purposes of an action by the opposite party. Any act, or omission to act, which is tantamount to a discontinuance of the proceeding has the same effect.<sup>4</sup> For

<sup>1</sup> *Besébé v. Matthews*, L. R. 2 C. P. 684.

<sup>2</sup> *Driggs v. Burton*, 44 Vt. 124, 143.

The term acquittal is often loosely used, as in *Sayles v. Briggs*, 4 Met. 421, and in *Vanderbilt v. Mathis*, 5 Duer, 304, where there has been no more than a termination of preliminary proceedings with a discharge of the prisoner. In such cases no *acquittal* is necessary, as will be seen later; none is possible in such proceedings. When an acquittal in a prosecution for crime is really necessary, there must be such a termination of the prosecution, in favor of the accused, as will enable him to plead the judgment in bar of another prosecution, as for instance by the plea of once in jeopardy.

<sup>3</sup> *Arundell v. White*, 14 East, 216.

<sup>4</sup> *Cardinal v. Smith*, 109 Mass. 158; *Strehlow v. Pettit*, 96 Wis. 22.

example: The defendant, having procured the arrest of the plaintiff in a civil cause, fails to enter and prosecute his suit. This is a termination of the proceeding.<sup>1</sup>

189. If however the (civil) prosecution went to judgment, the judgment must have been rendered in favor of the defendant therein, in order to enable him to sue for malicious prosecution. Judgment against the defendant would conclusively establish the plaintiff's right of action;<sup>2</sup> it could not therefore be treated as a false prosecution<sup>3</sup> though it might have been attended with malice,—unless indeed it was concocted in fraud.<sup>4</sup>

190. In a criminal trial the situation is indeed different. Such a proceeding is instituted by the public, and, when by indictment, is under the control of the attorney-general or other prosecuting officer; it is never under the control of the prosecutor. He has no authority over it; and, this being the case, he cannot, in principle, be bound by the action of the prosecuting officer. Should such officer therefore enter a dismissal of the suit before the defendant, having been duly indicted, has been put in jeopardy, this act, it seems, gives no right to the prisoner against the prosecutor. The course of proceeding was not arrested by the prosecutor, and he has a right to insist that the law shall take its regular course, and place the prisoner in jeopardy, before he shall have the power to seek redress. For example: The defendant procures the plaintiff to be indicted for arson. The prosecuting officer, failing to obtain evidence, enters a 'nolle prosequi' before the jury is sworn. The prosecution is not terminated in favor of the prisoner.<sup>5</sup>

Criminal  
trials distin-  
guished.

<sup>1</sup> *Cardinal v. Smith*, *supra*.

<sup>2</sup> *O'Brien v. Barry*, 106 Mass. 300, 304.

<sup>3</sup> *Id.* Or, as the case is sometimes put, judgment for the plaintiff would show that he had probable cause for the prosecution, a point to be considered hereafter.

<sup>4</sup> *Burt v. Place*, 4 Wend. 591; *Payson v. Caswell*, 22 Maine, 212.

<sup>5</sup> *Bacon v. Towne*, 4 Cush. 217. It has sometimes been said that the accused cannot sue in any case in which a 'nolle prosequi' has been en-

191. If however the prosecution was arrested by the grand jury's finding no indictment upon the evidence, and the consequent discharge of the prisoner, this is **No indictment found.** an end of the prosecution, such as will enable him (other elements present) to bring the action under consideration.<sup>1</sup> And the same is true when the prosecution is begun by complaint before a magistrate who has jurisdiction only to bind over or discharge the prisoner. The magistrate's entry that the prisoner is discharged entitles him, so far, to bring an action.<sup>2</sup> And this is true, though the prosecutor withdraw his prosecution.<sup>3</sup> In preliminary proceedings such as the foregoing there can be no conviction or acquittal. For example: The defendant prefers against the plaintiff a charge of forgery before a justice of the peace, who has authority only to bind over or discharge the prisoner. The justice's minutes contain the following entry: 'After full hearing in the case, the complainant withdrew his prosecution, and it was thereupon ordered' that the plaintiff be discharged. An action for malicious prosecution is now proper.<sup>4</sup>

tered, — that he must show a verdict. *Parker v. Farley*, 10 Cush. 279; *Brown v. Lakeman*, 12 Cush. 482; *Cardinal v. Smith*, 109 Mass. 158; *Ward v. Reasor*, 36 S. E. Rep. 470 (Va.). But that doctrine has been overturned in the State in which it was laid down. *Graves v. Dawson*, 130 Mass. 78; s. c. 133 Mass. 419; *Douglas v. Allen*, 56 Ohio St. 156, 158; *Murphy v. Moore*, 11 Atl. Rep. 665. See also *Driggs v. Burton*, 44 Vt. 124, 143. Further as to 'nolle prosequi' see *Commonwealth v. Tuck*, 20 Pick. 356, 365; *Langford v. Boston R. Co.*, 144 Mass. 431; *Welch v. Cheek*, 125 N. C. 353; s. c. 115 N. C. 310. If an order of nolle prosequi is entered after the trial jury is impanelled, in violation of the prisoner's right, as where he has demanded a verdict, he is acquitted in law; and such an acquittal is as good for the purpose of the suit for malicious prosecution as a verdict of acquittal. Further, the order of nolle prosequi may be a merely formal thing, and so immaterial to the question of the suit by the prisoner, as in *Graves v. Dawson*, *supra*.

<sup>1</sup> See *Byne v. Moore*, 5 Taunt. 187; s. c. L. C. Torts, 181.

<sup>2</sup> *Rider v. Kite*, 61 N. J. 8. But see *Ward v. Reasor*, 36 S. E. Rep. 470 (Va.), which clearly is wrong. Acquittal is required only where there can be an acquittal.

<sup>3</sup> *Sayles v. Briggs*, 4 Met. 421.

<sup>4</sup> *Id.*



192. In none of the foregoing classes of cases has there been an acquittal of the party prosecuted, or anything tantamount in law to an acquittal. To be acquitted in a prosecution for crime (the only case calling for remark), the accused must have been put in jeopardy; but a state of jeopardy is not reached until the swearing of the petit jury. Hence if acquittal were necessary, an action for malicious prosecution could not be instituted upon the failure of the grand jury to find an indictment, or upon the discharge of a magistrate who has no power to convict. In neither case has the prisoner been in jeopardy. The fact appears to be that, notwithstanding the language of some of the judges, a termination of the proceedings with an acquittal, actual or virtual, is necessary only in case of an indictment or information against the prisoner. In other cases, it is enough that the prosecution has been dismissed.<sup>1</sup>

What constitutes acquittal.

193. By way of summary, the various rules of law may be thus stated: A civil suit is sufficiently terminated (1) when the plaintiff has withdrawn, or otherwise discontinued, his action; or (2) when judgment has been rendered in favor of the defendant.

Summing up of termination.

<sup>1</sup> The rule requiring an acquittal of the party prosecuted runs back to an early English statute entitled 'Malicious Appeals.' Westm. 2, c. 12 (13 Edw. 1). By this statute it was ordained that when any person maliciously 'appealed [that is, accused and prosecuted] of felony surmised upon him, doth *acquit* himself in the King's Court in due manner,' &c., the appellor shall be imprisoned and be liable in damages to the injured party. A few years later statutes were passed against conspiracies to indict persons maliciously. L. C. Torts, 190. Between these statutes and the statute first mentioned, and taking its shape from them, the action for malicious prosecution arose. The various statutes applied to cases of prosecutions for felony alone; in such cases it was provided that acquittal was necessary. All other cases stand, so far as those statutes affect the law, as at common law. Prosecutions for misdemeanors, prosecutions before inferior courts, and civil prosecutions have been left to the wisdom of the judges (except those falling within the Statute of Malicious Distresses in Courts Baron, which required proof only of malice and a false complaint. L. C. Torts, 192).

A criminal suit is sufficiently terminated (1) when the prosecution, if brought before a magistrate, has been dismissed, or (2) when, if preferred before the grand jury, that body has found no indictment; or (3) when, an indictment having been found, and the prisoner having been put in jeopardy, the prisoner has been acquitted in fact or in law. It seems however that the termination must not have been brought about by the defendant in the former prosecution, as by a compromise or by his request.<sup>1</sup> Perhaps the prisoner should also have been discharged; but he is entitled to a discharge in all the cases mentioned.

### § 3. OF THE WANT OF PROBABLE CAUSE.

194. Supposing the plaintiff to have begun his action after the termination of the prosecution, it then devolves upon him further to establish the defendant's breach of duty by showing that he instituted the prosecution without probable cause.<sup>2</sup> And this appears to mean that he ought to show that no such state of facts or circumstances was known to him as would induce one of ordinary intelligence and caution to believe the

What probable cause means.

<sup>1</sup> *Welch v. Cheek*, 125 N. C. 355; s. c. 115 N. C. 310; *Langford v. Boston R. Co.*, 144 Mass. 431; cases of *nolle prosequi*. See also *Marcus v. Bernstein*, 117 N. C. 31.

<sup>2</sup> *Turner v. Ambler*, 10 Q. B. 252. Under the early law, as declared by the Statute of Malicious Appeals (ante, p. 96, note) and applied for centuries, this apparently was not true. Acquittal and malice made a presumptive case. Probable cause was a defence, but so far as it was distinguished from malice the burden of proof in regard to it seems to have been upon the defendant. See *Savill v. Roberts*, *Ld. Raym.* 374. It appears to have been considered as overturning the plaintiff's evidence of malice. After *Savill v. Roberts* (1699) the defendant had no need to prove probable cause if an indictment not involving scandal or loss of life or liberty had been found against the plaintiff; the plaintiff being 'constrained to show express malice and iniquity in the prosecution.' *Savill v. Roberts*, *Lord Holt*. This would be done evidently by proving want of probable cause. The action for malicious prosecution was 'not to be favored but managed with great caution,' in cases not involving scandal or loss of life or liberty. *Id.* This doctrine led the way for the modern rule requiring the plaintiff to prove want of probable cause in all cases.

charge preferred to be true.<sup>1</sup> Or, conversely, probable cause for preferring a charge of crime is shown by facts, actual or believed by him to be actual, which would create a reasonable suspicion in the mind of a reasonable man.<sup>2</sup>

195. To act therefore on very slight circumstances of suspicion, such as a man of caution would deem of little weight, is to act without probable cause. For example: The defendant procures the arrest of the plaintiff upon a charge of being implicated in the commission of a robbery, which in fact has been committed by a third person alone, who absconds. The plaintiff, who has been a fellow-workman with the criminal, has been heard to say that he (the plaintiff) had been told, a few hours before the robbery, that the robber had absconded, and that he had told the plaintiff that he intended to go to Australia. The robber has also been seen, early in the morning after the robbery, coming from a public entry leading to the back door of the plaintiff's house. The defendant has no probable cause for the arrest.<sup>3</sup>

196. Probable cause however does not depend upon the actual state of the case, in point of fact, but upon honest and **Acting in bad** reasonable belief.<sup>4</sup> Hence, though the prosecutor **faith.** be in a situation to show that he had probable cause, so far as regards the strength of his information, still if he did not believe the facts and rely upon them in procuring the arrest, he has committed a breach of duty towards the person arrested. For example: The defendant goes before a magistrate and prefers against the plaintiff the charge of larceny, for which there was reasonable ground in the facts within the defendant's cognizance. The defendant however does not believe the plaintiff guilty, but prefers

<sup>1</sup> *Driggs v. Burton*, 44 Vt. 124; *Boyd v. Cross*, 35 Md. 194.

<sup>2</sup> *Broughton v. Jackson*, 18 Q. B. 378; *Panton v. Williams*, 2 Q. B. 169, Ex. Ch.; *Ellis v. Simonds*, 168 Mass. 316; *Boyd v. Cross*, *supra*; *Ramsey v. Arrott*, 64 Texas, 320; *Davis v. Pacific Telephone Co.*, 127 Calif. 312; *Torsch v. Dell*, 88 Md. 459.

<sup>3</sup> *Busst v. Gibbons*, 30 Law J. Ex. 75. *Comp. Lister v. Perryman*, L. R. 4 H. L. 521, as to hearsay.

<sup>4</sup> *Goldstein v. Foulkes*, 19 R. I. 291; *King v. Colvin*, 11 R. I. 582.

the charge in order to coerce the plaintiff to pay a debt which he owes to the defendant. The defendant has acted without probable cause.<sup>1</sup>

197. The question of probable cause is to be decided by the circumstances existing or supposed to exist at the time of the arrest, and not by the turn of subsequent events;<sup>2</sup> such at all events is the general rule. If the defendant had at that time such grounds for supposing the plaintiff guilty of the crime charged as would satisfy a cautious man, he violates no duty to the plaintiff in procuring his arrest, though such grounds be immediately and satisfactorily explained away, or the truth discovered by the prosecutor himself. For example: The defendant procures the plaintiff to be arrested for the larceny of certain ribbons, on reasonable grounds of suspicion. He afterwards finds the ribbons in his own possession. He is not liable.<sup>3</sup>

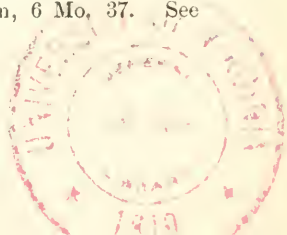
Time of probable cause: subsequent events.

198. On the other hand, in accordance with the same principle, if the prosecutor was not possessed of facts justifying a belief that the accused was guilty of the charge, it matters not that subsequent events (short of a judgment of conviction, as to which presently) show that there existed, in fact, though not to the prosecutor's knowledge, circumstances sufficient to have justified an arrest by any one cognizant of them. He has violated his duty in procuring the arrest. For example: The defendant to an action for malicious prosecution shows facts sufficient to constitute probable cause, but does not show that he was cognizant of such

<sup>1</sup> *Broad v. Ham*, 5 Bing. N. C. 722. Had the defendant believed the charge, would it have been material that he procured the arrest mainly for the purpose of getting his pay?

<sup>2</sup> *Thompson v. Beacon Rubber Co.*, 56 Conn. 493; *Swain v. Stafford*, 4 Ired. 392 and 398; *Delegal v. Highley*, 3 Bing. N. C. 950. But see *Adams v. Lisber*, 3 Blackf. 241; *Hickman v. Griffin*, 6 Mo. 37. See L. C. Torts, 198-200.

<sup>3</sup> *Swain v. Stafford*, 4 Ired. 392 and 398.



facts when he procured the plaintiff's arrest. The defence is not good.<sup>1</sup>

199. It has however been declared that, while acquittal is no evidence of probable cause, conviction is conclusive of its existence;<sup>2</sup> and this though the verdict is **Conviction.** afterward set aside and, upon a new trial, an acquittal follows.<sup>3</sup> But this, it will be seen, is inconsistent with the rule that the question of probable cause is to be determined by the state of facts within the prosecutor's knowledge (supposing him to have acted bona fide upon such facts) at the time of the arrest. Conviction does not, in point of fact, prove that the prosecutor at the time had reasonable grounds to suspect the guilt of the prisoner; such grounds, that is, as would have induced a cautious man to arrest the suspected person.<sup>4</sup> It would, it seems, be more accurate to say that the old Statute of Malicious Appeals, which in reality lies at the foundation of the law concerning criminal prosecutions, by plain implication exempted the prosecutor (of felony) from liability in case of the conviction of the prisoner.<sup>5</sup>

<sup>1</sup> Delegal v. Highley, 3 Bing. N. C. 950.

<sup>2</sup> Whitney v. Peckham, 15 Mass. 243 (by a trial magistrate); Parker v. Farley, 10 Cush. 279, 282; Morrow v. Wheeler & Wilson Co., 165 Mass. 349; Dennehey v. Woodsum, 100 Mass. 195, 197; Holliday v. Holliday, 123 Calif. 26, 32; Crescent Live Stock Co. v. Butchers' Union, 120 U. S. 141; Hartshorn v. Smith, 104 Ga. 235; Short v. Spragins, id. 628; Griffis v. Sellars, 2 Dev. & B. 492. See ante, p. 92. Contra, Burt v. Place, 4 Wend. 591; Metropolitan Bank v. Pooley, 10 App. Cas. 210, ante, p. 92, note.

<sup>3</sup> Whitney v. Peckham, supra. Contra everywhere of simple acquittal. Thompson v. Beacon Rubber Co., 56 Conn. 493; Bitting v. Ten Eyck, 82 Ind. 421; Richter v. Koster, 45 Ind. 440 (conviction, when set aside); Heldt v. Webster, 60 Texas, 207; Eastman v. Monastes, 32 Oregon, 291; Apgar v. Woolston, 43 N. J. 60; Philpot v. Lucas, 101 Iowa, 478.

<sup>4</sup> Thompson v. Beacon Rubber Co., 56 Conn. 493; Philpot v. Lucas, 101 Iowa, 478, 480, 481.

<sup>5</sup> Hess v. Oregon Co., 31 Oregon, 503. See Eastman v. Monastes, 32 Oregon, 291, 295, and cases cited; ante, p. 96, note. If the forgotten



200. There are other seeming anomalies relating to this phase of probable cause; one of them is found in the effect accorded by some courts to the action of the grand jury, or to that of a magistrate who has power only to bind over the accused for trial. Action of  
grand jury  
or magistrate. That action is said to furnish *prima facie* (i. e. sufficient) evidence in regard to probable cause, in a suit for malicious prosecution.<sup>1</sup> For example: The now defendant prosecutes the now plaintiff before the grand jury, on a charge of larceny, and the grand jury throws out the bill. This is deemed *prima facie* evidence of want of probable cause in the present suit.<sup>2</sup> Again: A magistrate binds over a person accused of crime, who is afterwards tried and acquitted. This is deemed *prima facie* evidence of probable cause in an action against the prosecutor for malicious prosecution.<sup>3</sup>

201. Other courts have taken a different view of the matter, denying that the action of the grand jury or of the

statute had been strictly followed, this (which is now true generally) would be true only in cases of conviction of what was felony at common law. In other cases the conviction could not, by the old statute, bar an action. Nor, by modern law, could conviction bar an action for malicious prosecution on grounds of estoppel, because the parties to the two actions are different; the criminal suit being between the State and the prisoner. The judgment could not, properly taken, be more than *prima facie* evidence of probable cause, even if, of itself alone, it could be considered as amounting to any evidence on that point. The question before the petit jury, as has elsewhere been observed (post, p. 103, note), is, not whether there was probable cause for the arrest, within the knowledge of the prosecutor, but whether the prisoner is guilty. However, the language of many of the decisions is that the conviction is conclusive of probable cause; and the author at one time considered this to be correct. *L. C. Torts*, 196, 197. See ante, p. 92.

<sup>1</sup> *Hidy v. Murray*, 101 Iowa, 65; *Philpot v. Lucas*, id. 478, 481; *Brant v. Higgins*, 10 Mo. 728; *Bostick v. Rutherford*, 4 Hawks, 83; *William v. Norwood*, 2 Yerg. 329.

<sup>2</sup> See *Nicholson v. Coghill*, 6 Dowl. & R. 12, 14, *Holroyd, J.*; *Broad v. Ham*, 5 Bing. N. C. 722, 727, *Coltman, J.*

<sup>3</sup> *Bacon v. Towne*, 4 Cush. 217; *Graham v. Noble*, 13 Serg. & R. 270; *Burt v. Place*, 4 Wend. 591. See *Reynolds v. Kennedy*, 1 Wils. 232; *Sutton v. Johnstone*, 1 T. R. 493, 505, 506.



magistrate is evidence on the question of probable cause, in the action for malicious prosecution.<sup>1</sup> How can it be, they say in effect, that what is no evidence at all before the grand jury or the magistrate in the same case can be *prima facie* evidence before a petit jury in a different case?<sup>2</sup> To this reasoning it might be added that the grand jury or the magistrate does not consider what prompted the prosecutor, but whether there is now sufficient evidence to justify holding the accused further for trial. But the contrary doctrine, after all, is only a doubtful application of the rule of the relevancy of a later fact to prove an earlier, and hence may be thought not inconsistent with the true meaning of probable cause.

202. Further, it has been seen<sup>3</sup> that in this country an action for a malicious civil suit may be brought. Now while it is held that the mere omission to appear and prosecute an action, whereby the defendant obtains a judgment of nonsuit, is no evidence of want of probable cause,<sup>4</sup> it is deemed that a voluntary discontinuance, being a positive act,<sup>5</sup> may show *prima facie* evidence of the same. For example (taking a case from the old law which permitted an arrest in an ordinary civil suit): The now defendant procures the now plaintiff to be arrested and held to bail in an action on contract. The case comes on for trial very shortly afterwards, and the plaintiff discontinues his suit. This is deemed *prima facie* evidence of want of probable cause.<sup>6</sup>

<sup>1</sup> *Noble v. White*, 103 Iowa, 352, 360.

<sup>2</sup> See *Farwell v. Laird*, 58 Kans. 402; *Sweeney v. Perney*, 40 Kans. 102; *Israel v. Brooks*, 23 Ill. 575. As touching upon the question it may be noticed that a magistrate's action in regard to probable cause has no bearing on an officer's justification of probable cause, in a suit for false imprisonment.

<sup>3</sup> Ante, p. 91.

<sup>4</sup> *Snclair v. Eldred*, 4 Taunt. 9; *Webb v. Hill*, 3 Car. & P. 485.

<sup>5</sup> Sed qu. of the relevancy of such fact.

<sup>6</sup> *Nicholson v. Coghill*, 6 Dowl. & R. 12; *Webb v. Hill*, 3 Car. & P. 485.

203. Again, the mere abandonment of the prosecution by the prosecutor, and the acquittal of the prisoner, are no evidence of a want of probable cause.<sup>1</sup> Such facts in themselves show nothing except that the prosecution has failed. It may still have been undertaken upon reasonable grounds of suspicion.<sup>2</sup> Still, the circumstances of the abandonment may be such as to indicate prima facie a want of probable cause. For example: The defendant presents two bills for perjury against the plaintiff, but does not himself appear before the grand jury, and the bills are ignored. He presents a third bill, and, on his own testimony, the grand jury return a true bill. The defendant now keeps the prosecution suspended for three years, when the plaintiff, taking down the record for trial, is acquitted; the defendant declining to appear as a witness, though in court at the time and called upon to testify. These facts indicate the absence of probable cause.<sup>3</sup>

Abandonment  
of prosecution.

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204. If the prosecutor takes the advice of a practising lawyer upon the question whether the facts within his knowledge<sup>4</sup> are such as to justify a complaint, assuming that he has fully, fairly, and honestly stated such facts,<sup>5</sup> and acts bona fide upon the advice given, he will be protected even though the counsel gave erroneous advice.<sup>6</sup> That is, he will be protected, though he might not

Acting on  
legal advice.

<sup>1</sup> *Willans v. Taylor*, 6 Bing. 183; *Vanderbilt v. Mathis*, 5 Duer, 304; *Cases*, 58; *Johnson v. Chambers*, 10 Ired. 287.

<sup>2</sup> The magistrate or grand jury decides whether there is reasonable ground for putting the prisoner upon trial; the petit jury decides whether the prisoner is guilty.

<sup>3</sup> *Willans v. Taylor*, 6 Bing. 183.

<sup>4</sup> *Holliday v. Holliday*, 123 Calif. 26; *Parker v. Parker*, 102 Iowa, 500; *Black v. Buckingham*, 174 Mass. 102, 107 ('within his knowledge and belief').

<sup>5</sup> *Jones v. Morris*, 97 Va. 43; *O'Neal v. McKinna*, 116 Ala. 606.

<sup>6</sup> *Terre Haute R. Co. v. Mason*, 148 Ind. 578; *O'Neal v. McKinna*, 116 Ala. 606; *Williams v. Casebeer*, 126 Calif. 77; *Holliday v. Holliday*, 123 Calif. 26; *Hicks v. Brantley*, 102 Ga. 264; *Cooper v. Utterbach*, 37 Md. 282; *Powlowski v. Jenks*, 115 Mich. 275; *Black v. Buckingham*, 174 Mass. 102, 107; *Olmstead v. Partridge*, 16 Gray, 381; *Baker v.*

have been in possession of facts such as would have justified a prosecution without the advice. For example: The defendant states to his attorney the facts in his possession concerning a crime supposed to have been committed by the plaintiff. The attorney advises the defendant that he can safely procure the plaintiff's arrest. The defendant is not liable, though the facts presented did not in law constitute probable cause.<sup>1</sup>

205. The prosecutor must however, as the proposition itself states, act bona fide upon the advice given, if he rest his defence upon such a ground alone.<sup>2</sup> For example: The defendant procures the arrest of the plaintiff, having first taken the advice of legal counsel upon the facts. This advice is erroneous, and it is not acted upon in good faith believing it to be correct; the arrest being procured for the indirect and sinister purpose of compelling the plaintiff to sanction the issuance of certain illegal bonds. The defendant is liable.<sup>3</sup>

206. If, after taking legal advice and before the arrest, new facts come to the knowledge of the prosecutor, he cannot justify the arrest as made on advice, unless such new facts are consistent with the advice which has been given. If they should be of a contrary nature, casting new doubt upon the party's guilt, the prosecutor cannot safely proceed to procure an arrest except upon new advice; unless indeed the entire chain of facts in his possession shall satisfy the court that there existed a reasonable ground for his action. To make use of the advice given, when the new facts indicate that the accused is not guilty, would not be to act upon the advice in good faith.<sup>4</sup>

Hornick, 57 S. C. 213; *Cole v. Curtis*, 16 Minn. 182; *Hess v. Oregon Co.*, 31 Oregon, 503; *Ravenga v. Mackintosh*, 2 B. & C. 693; *Snow v. Allen*, 1 Stark. 502.

<sup>1</sup> *Snow v. Allen*, *supra*.

<sup>2</sup> *O'Neal v. McKinna*, *supra*; *Ravenga v. Mackintosh*, 2 B. & C. 693. Whether the advice given was given in good faith is immaterial. *Sandell v. Sherman*, 107 Calif. 397; *Seabridge v. McAdam*, 119 Cal. 460.

<sup>3</sup> *Ravenga v. Mackintosh*, *supra*. See *Hewlett v. Cruchley*, 5 Taunt. 277, 283.

<sup>4</sup> See *Fitzjohn v. Mackinder*, 9 C. B. N. S. 505, 531, Ex. Ch., *Cockburn, C. J.*; *Cole v. Curtis*, 16 Minn. 182.

207. Again, if the only defence be that the prosecutor acted upon legal advice, a breach of duty may still be made out if it appear that the prosecutor untruly stated to the counsel the facts within his knowledge. The plaintiff's case, so far as it rested on the proof of want of probable cause, would be established by showing that the actual facts known to the prosecutor (differing from those on which the advice was obtained) showed that he had no reasonable ground for instituting the prosecution.

208. The result is, that the defence of advice of legal counsel, to establish probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose; and the statement made at the time by the prosecutor to his counsel must be full and true, and consistent with that purpose.<sup>1</sup>

209. This defence of having acted upon legal advice is, it seems, a strict one, confined to the case of advice obtained from lawyers admitted to practise in the courts.<sup>2</sup> Such persons are certified to be competent to give legal advice, and their advice when properly obtained and acted upon is conclusive of the existence of probable cause. But if the prosecutor act upon the advice of a person not a lawyer, and therefore not declared competent to give legal advice, the facts must be shown upon which the advice was obtained, however honestly and properly it was sought and acted upon. It is not enough, by the better view, that the advice was given by an officer of the law, professing familiarity with its principles, if such a person were not a lawyer. For example: The defendant procures the arrest of the plaintiff upon advice of a justice of the peace, with whom he has been

<sup>1</sup> *Walter v. Sample*, 25 Penn. St. 275.

<sup>2</sup> It is held in *Cole v. Andrews*, 74 Minn. 93, that the relation of attorney and client must exist between the person asking and the person receiving the advice to make the case one of probable cause; which is contra to *Hess v. Oregon Co.*, 31 Oregon, 503, to *Wenger v. Phillips*, 195 Penn. St. 214, and to *Oliver v. Pate*, 43 Ind. 132. The last named case is denied in *Cole v. Andrews*. The cases cited are cases of advice given by a prosecuting officer. See also *Williams v. Casebeer*, 126 Calif. 77, advice by a police judge.

in the habit of advising on legal matters; but the justice is not a lawyer. This is not evidence of probable cause.<sup>1</sup>

210. The want of probable cause is not to be inferred *because* of mere evidence of malice, since a person may maliciously prosecute another against whom he has the strongest evidence; whom indeed he may have caught in the commission of the crime.<sup>2</sup> There must be some evidence indicating that the prosecutor instituted the suit under circumstances which would not have induced a cautious man to act.

Malice does not show probable cause.

211. It should be observed finally that it may be necessary for the plaintiff, even in a jury case, to convince the *judge* of the want of probable cause upon the facts proved. The facts material to the question of probable cause must be found by the jury; but the judge may have to decide whether the facts so found establish probable cause or want of it. That is a question of law.<sup>3</sup>

Action of the judge.

#### § 4. OF MALICE.

212. To make out a breach of duty by the defendant, the plaintiff must also produce evidence that the prosecution was instituted with express or actual malice towards the accused.<sup>4</sup> Malice is not to be inferred *because* of mere proof of a want of probable cause,<sup>5</sup> any more than want of probable cause

Express malice necessary: evidence of malice: a question of fact.

<sup>1</sup> *Beal v. Robeson*, 8 Ired. 276. But see *Williams v. Casebeer*, 126 Calif. 77.

<sup>2</sup> *Turner v. Ambler*, 10 Q. B. 252, 257; *Boyd v. Cross*, 35 Md. 194.

<sup>3</sup> *Panton v. Williams*, 2 Q. B. 169, Ex. Ch.; *Lister v. Perryman*, L. R. 4 H. L. 521; *Abrath v. Northeastern Ry. Co.*, 11 App. Cas. 247; *Dietz v. Langfitt*, 63 Penn. St. 234; *Driggs v. Burton*, 44 Vt. 124; *Boyd v. Cross*, supra; *Druinn v. Cessnum*, 58 Kans. 331.

<sup>4</sup> *Vanderbilt v. Mathis*, 5 Duer, 304; Cases, 58; *Pangburn v. Bull*, 1 Wend. 345; *Carson v. Edgeworth*, 43 Mich. 241; *Dietz v. Landfitt*, 63 Penn. St. 234; *Gabel v. Weisensee*, 49 Texas, 131; *Hicks v. Brantley*, 102 Ga. 264; *Torsch v. Dell*, 88 Md. 459, 468, laying down the meaning of the term, on which see ante, pp. 16-23.

<sup>5</sup> *Vanderbilt v. Mathis*, 5 Duer, 304; Cases, 58; *Griffin v. Chubb*, 7 Texas, 603, 617.



is to be inferred because of mere proof of malice; it may be inferred as a *fact* from want of probable cause, but it is not a necessary inference.<sup>1</sup> A man may institute a prosecution against another without malice either in the legal or the popular sense, though he had no sufficient ground for doing so.<sup>2</sup>

213. The jury must be allowed, and it is their duty, to pass upon the question of malice as a distinct matter. There is therefore no such thing in the law of malicious prosecution as implied malice or malice in law.<sup>3</sup> For example: Evidence having been introduced in an action for a malicious prosecution, which showed that the defendant had instituted the prosecution without probable cause, the judge instructs the jury that there are two kinds of malice, malice in law and malice in fact, and that in the present case there was malice in law because the prosecution was wrongful, being without probable cause. This is erroneous; the existence of malice is a question for the jury.<sup>4</sup>

## § 5. OF DAMAGE.

214. If the charge upon which the prosecution was instituted was such as (being untrue) would have constituted actionable slander had it not been preferred in court, the plaintiff, upon proof of the termination of the prosecution, the want of probable cause, and malice, has made out a case, and is entitled to judgment. It is not necessary for him to prove that he has sustained any pecuniary damage. For example: The defendant causes the plaintiff to be indicted for the stealing of a cow, falsely,

When damage  
need not be  
proved.

<sup>1</sup> O'Neal *v.* McKinna, 116 Ala. 606; Hicks *v.* Brantley, 102 Ga. 264; Helwig *v.* Beckner, 149 Ind. 131; McGowan *v.* McGowan, 122 N.C. 145; Carson *v.* Edgeworth, 43 Mich. 241; Dietz *v.* Langfitt, 63 Penn. St. 234. But see Torsch *v.* Dell, 88 Md. 459, 467, that want of probable cause raises a *prima facie* presumption of malice, on authority of Boyd *v.* Cross, 35 Md. 197; which is contrary to the authorities generally.

<sup>2</sup> Griffin *v.* Chubb, *supra*, at p. 616. As to the legal sense of malice, as the term is now rightly to be taken, see *ante*, pp. 16-23.

<sup>3</sup> Mitchell *v.* Jenkins, 5 B. & Ad. 588; Carson *v.* Edgeworth, *supra*.

<sup>4</sup> Mitchell *v.* Jenkins, *supra*; Vanderbilt *v.* Mathis, *supra*.



without probable cause, and of malice. The plaintiff is entitled to recover without producing evidence that he has sustained any actual damage.<sup>1</sup>

215. But it has been decided that it is only for the prosecution of a charge the mere oral imputation of which would constitute actionable slander that the institution of the prosecution can be actionable without damage.<sup>2</sup> For example: The defendant falsely prefers against the plaintiff a simple charge of assault and battery, without cause and with malice. The plaintiff cannot recover for a malicious prosecution without proof of special damage.<sup>3</sup>

216. It follows that this action for a malicious prosecution cannot be maintained without proof of damage when the prosecutor has procured the indictment of the plaintiff for the commission of that which is not a criminal offence. For example: The defendant procures the plaintiff to be indicted for the killing of the former's cattle. The plaintiff must prove special damage; the offence, though charged as a crime, being only a trespass.<sup>4</sup>

## § 6. OF WANT OF JURISDICTION, ETC.

217. If the prosecution fail by reason of the circumstance that the court in issuing its warrant exceeded its jurisdiction, **What action or** that the warrant or indictment was defective, **proper.** the question may arise whether the accused should sue for malicious prosecution, for false imprisonment if there was an arrest, or for slander if the charge was defamatory. In certain cases it is plain that he may bring an action for false imprisonment; for which the reader is referred to the chapter on that subject. It would give him an obvious advantage to sue for slander, since then he would not be compelled to prove a want of probable cause or the existence of

<sup>1</sup> See *Frierson v. Hewitt*, 2 Hill (S. C.), 499; *Byne v. Moore*, 5 Taunt. 187, Mansfield, C. J.; s. c. L. C. Torts, 181.

<sup>2</sup> *Byne v. Moore*, *supra*. See *Quartz Hill Mining Co. v. Eyre*, 21 Q. B. Div. 674, 692.

<sup>3</sup> *Byne v. Moore*, *supra*.

<sup>4</sup> *Frierson v. Hewitt*, 2 Hill (S. C.), 499.

malice; it may be that that remedy is applicable.<sup>1</sup> The ordinary remedy against the prosecutor appears to be an action for malicious prosecution,<sup>2</sup> unless the prosecutor participated in making a false arrest.

*omit to § 233*

### § 7. OF KINDRED WRONGS.

218. In connection with malicious prosecution there is a whole group of kindred wrongs, kindred in name at least, which deserve to be distinguished and explained; to wit, wrongs of malicious arrest, malicious attachment or execution, malicious search, and malicious abuse of process, — and perhaps others.

Kindred  
wrongs  
named.

219. These wrongs differ as a whole from malicious prosecution in this, that while the prosecution in the last-named wrong is an original proceeding, the arrest, attachment, execution, or other act in these kindred wrongs is usually a secondary or ancillary proceeding in some original action which may have been perfectly lawful. It will be assumed accordingly that the original proceeding in these cases was lawful. How these wrongs severally differ from malicious prosecution will now be seen.

How these  
wrongs differ  
from mali-  
cious prose-  
cution.

220. Malicious arrest as a tort differs from malicious prosecution in perhaps two particulars touching the proof required to make a cause of action, to wit, malice and the termination of the prosecution or suit.

221. In regard to malice, it appears to be enough that the arrest was wrongful, — in what way is probably immaterial. Thus it appears to be enough that the arrest was without probable cause; malice, if that is true,

Malice: prob-  
able cause.

<sup>1</sup> See L. C. Torts, 205, and cases cited.

<sup>2</sup> *Pippet v. Hearn*, 5 B. & Ald. 634; *Morris v. Scott*, 21 Wend. 281; *Stone v. Stevens*, 12 Conn. 219; *Hays v. Younglove*, 7 B. Mon. 545; *Shaul v. Brown*, 28 Iowa, 37. See *Braveboy v. Cockfield*, 2 McMull. 270; *Turpin v. Remy*, 3 Blackf. 210. Contra, *Bixby v. Brundige*, 2 Gray, 129. If the supposed court was no court known to the law, as e. g. if it was only some self-constituted body like a vigilance committee, an action for defamation could certainly be maintained.

being only a fiction and not a distinct entity requiring proof.<sup>1</sup> If however malice as an entity must actually be proved, as for instance by evidence that the defendant procured the arrest with knowledge that there was no probable cause for it,<sup>2</sup> there is no difference in the point of malice between the two wrongs. However that may be, it is clear that malice, in whatever sense, would not make an arrest wrongful, if there was probable cause for it; there is no difference between the two wrongs in that particular.

222. In regard to the termination of the prosecution, it seems to be held in England that an action for a malicious arrest under secondary process cannot be brought  
**Termination.** until the *original* prosecution or action has come to an end.<sup>3</sup> But such a rule would appear to be unsound. It should seem to be enough that the warrant has been set aside, if any termination of proceedings be necessary. Thus if a man has been wrongfully arrested in an action on contract, he ought in reason to be entitled to sue at once upon discharge for any damage he has sustained, and not compelled to wait the event of the original action.<sup>4</sup> The chief reason for requiring a termination of the prosecution, in suits for malicious prosecution, to wit, that otherwise there might be inconsistent judgments, is not true of the case in question; judgment that the defendant procured the *arrest* wrongfully cannot be inconsistent with the right of that party to judgment on the contract. Such is the American doctrine in regard to malicious attachment,<sup>5</sup> as will be seen; and it may well be doubted whether there is any ground for a distinction on this point between the two cases.

<sup>1</sup> As to malice as an entity and malice as a fiction, see ante, pp. 16-22.

<sup>2</sup> Ante, p. 17. See *Swift v. Witchard*, 103 Ga. 193, 196.

<sup>3</sup> *Jenings v. Florence*, 2 C. B. N. s. 467; *Grainger v. Hill*, 4 Bing. N. C. 212; *Cases*, 67, 72, *Tindal, C. J.* *Jenings v. Florence*, the later of these cases, speaks only of a termination of the proceedings; but in *Grainger v. Hill* it is said that the original suit must have terminated. For other cases in regard to malicious arrest, see *Daniels v. Fielding*, 16 M. & W. 200; *Gibbons v. Alison*, 3 C. B. 181; *Phillips v. Naylor*, 4 H. & N. 565.

<sup>4</sup> See *Swift v. Witchard*, 103 Ga. 193, 196.

<sup>5</sup> *Zinn v. Rice*, 154 Mass. 1.

223. Damage must no doubt be proved unless the arrest was procured by defamatory allegations which as slander would be actionable per se. There appears to be no difference between cases of malicious arrest and malicious prosecution in that respect. Damage.

224. To sum up: In an action for a malicious arrest the plaintiff has to prove want of probable cause, the termination of the proceeding in which the arrest was made, — possibly of the original proceeding, — and damage or not, according to the nature of the allegations made in procuring the arrest. If the process was void on its face, the case is one for an action for false imprisonment.<sup>1</sup>

225. Malicious attachment as a tort appears to be very similar. Malice as a distinct entity, at least as motive, is no necessary part of the cause of action, though it may well be present and strengthen a case already made.<sup>2</sup> An attachment of property could not be wrongful simply because it was procured by malicious motives. What must be proved is want of probable cause, as by evidence that the attachment was manifestly excessive,<sup>3</sup> and damage; and that is all, unless knowledge of want of probable cause is required.<sup>4</sup> Malice: probable cause: excessive levy.

226. It is not necessary for the plaintiff (defendant in the original suit and attachment) to await the result of the original action; enough that the malicious attachment has worked damage to the plaintiff. The rule in malicious prosecution requiring a termination of the original proceedings is, by its terms and nature, limited to prosecutions 'to establish a charge or cause of action, and cannot include Termination.

<sup>1</sup> See the chapter on that subject for the nature of such an action.

<sup>2</sup> See *Zinn v. Rice*, 154 Mass. 1, in its statement of facts.

<sup>3</sup> *Savage v. Brewer*, 16 Pick. 453.

<sup>4</sup> If the attachment was manifestly excessive, the attaching party would *know* that there was no probable cause, and that would be malice as an entity. *Savage v. Brewer*, 16 Pick. 453; *Sommer v. Wilt*, 4 Serg. & R. 19. See ante, pp. 17–20. For other cases of malicious attachment, see *Stewart v. Cole*, 46 Ala. 646; *Spengler v. Davy*, 15 Gratt. 381.

an *ex parte* use of process incidental and collateral' thereto, 'in defence to which the falsity of the charge cannot be shown.'<sup>1</sup> Hence there is no inconsistency between the suit for the malicious attachment and the suit in which the attachment was made.

**227.** Where attachment of property is procured under statutory authority only, the attaching party's justification must of course be found in the statute. Whether the **Statutory attachment.** act is wrongful or not, and what must be proved to make a cause of action, will be determined accordingly. But it is believed that the statutes in such cases always require the person attaching to show probable cause. Want of probable cause and damage would accordingly make a case, as in non-statutory attachment.

**228.** In regard to malicious execution, little need be said.<sup>2</sup> Malice as motive could not make the levy wrongful; a manifestly excessive levy would be wrongful, but it **Malice: excessive levy.** would be wrongful only in respect of the excess, supposing the subject severable, and of any damage done. For such damage the officer would be liable accordingly; the plaintiff in the execution also, if he directed or participated in the wrong. The action, whether in such a case, or for levying execution of a judgment known to be satisfied,<sup>3</sup> would naturally be for a wrongful taking of property, — trespass, trover, or the like, — a very different remedy from that for a malicious prosecution.<sup>4</sup>

**229.** Malicious search is in this country a statutory wrong, though possibly a common-law wrong also. It has **Statutory and constitutional wrong: what must be proved.** even been made a subject of constitutional law; taking that form on or after the separation of America from England, because of differences which

<sup>1</sup> *Zinn v. Rice*, supra, W. Allen, J.

<sup>2</sup> See *Churchill v. Siggers*, 3 El. & B. 938; *Jenings v. Florence*, 2 C. B. N. S. 467; *Craig v. Hasell*, 4 Q. B. 481; *Sommer v. Wilt*, 4 Serg. & R. 19; *Hilliard v. Wilson*, 65 Texas, 286.

<sup>3</sup> *Deyo v. Van Valkenburgh*, 5 Hill, 242.

<sup>4</sup> See later chapters.



had arisen between the colonies and the mother country over search warrants.<sup>1</sup> The fourth amendment to the Constitution of the United States provides that ‘no warrants shall issue but upon *probable cause*, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.’ This is only a solemn declaration of the English common law. What must be proved to set aside the warrant, or to make a cause of action if the warrant has done its work, is indicated by the quotation; though if the warrant was absolutely void, the remedy will be trespass or trover.

230. In the last of these kindred wrongs, malicious abuse of process, process which in itself may have been lawful has been perverted to a purpose not contemplated by it. In other words the exigency of the writ has not been followed. Malice again, as a distinct entity, plays no part in the case; all that is required for a cause of action is proof that the writ has been applied to a purpose not named or implied by it, to the damage of the plaintiff. Perversion or ‘abuse’ of the process gives the name ‘malicious’ to the case; the malice is fictitious, or may be.

Nature of the wrong: what must be proved.

231. It is not necessary for the plaintiff to wait the termination of the original proceeding or, since the process has not been followed, to prove that there was no probable cause for the issuance of the particular process. For example: The defendant, under a warrant for the arrest of the plaintiff in an action of debt, according to law, makes use of the same to extort property from the plaintiff, in which he succeeds, to the damage of the plaintiff. The plaintiff sues for the loss while the action of debt is pending, and without alleging want of probable cause. He is entitled to recover.<sup>2</sup>

<sup>1</sup> As writs of ‘assistance’ of government officers.

<sup>2</sup> *Grainger v. Hill*, 4 Bing. N. C. 212; Cases, 67. The original suit itself was premature, the debt not being due; but that made no difference.



232. Recent English decisions have also brought to light the existence of a right of action for maintenance.<sup>1</sup> This is a tort founded upon early statutes making maintenance a criminal offence;<sup>2</sup> an action for damages being permitted only where the defendant has aided the prosecution of some suit in which he had no interest or, it seems, motive other than that of stirring up or keeping alive strife. It has lately been decided that if the defendant's conduct was based on charity, reasonable or not, the action will fail.<sup>3</sup>

<sup>1</sup> *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; *Harris v. Brisco*, 17 Q. B. Div. 504; *Metropolitan Bank v. Pooley*, 10 App. Cas. 210.

<sup>2</sup> It is doubtful if a corporation can be liable for the offence. 10 App. Cas. at p. 218, Lord Selborne.

<sup>3</sup> *Harris v. Brisco*, *supra*.

## CHAPTER IV.

### 2. *Lawful Acts done of Malice, concluded.*

#### MALICIOUSLY PROCURING REFUSAL TO CONTRACT.

*Statement of the duty.* A owes to B the duty not, by wrongful means, to procure C to refuse, to B's damage, to contract with him (B), if B is endeavoring to contract with C. A by some authorities does, by others does not, owe to B the duty not maliciously, without wrongful means, to procure C in like case to refuse, to B's damage, to contract with him. As for malicious interference with an existing business, quære.

#### § 1. OF MEANS AND MALICE: WHAT MUST BE PROVED.

233. The use of wrongful means may for the present be dismissed with a word. Every man has by law a right to endeavor to enter into contract with others, and for any one to use wrongful means, successfully and with damage, to prevent the accomplishment of the endeavor would be an infringement of that right, and therefore a tort. It will only be necessary to return to the subject when later, in examining a particular question, it becomes necessary to consider whether conspiring successfully to prevent the purpose amounts to the use of means, within the rule.

Freedom of contract: interference by wrongful means.

234. It remains to consider maliciously procuring refusal to contract, where no wrongful means are brought to bear.

235. In former editions of this book it has been stated, in effect, that an action lies for maliciously procuring one man to refuse to contract with another, if the latter suffered damage thereby; but not without noting that the doctrine had been denied. The statement was founded upon express decisions both in this country and

Change in the current of authority.

in England.<sup>1</sup> But in the year 1898 the doctrine was repudiated in England, decisions and dicta to the contrary being reversed or overruled by the House of Lords, and the contrary plainly laid down.<sup>2</sup> The principal decision too in this country, upon which the statement was based,<sup>3</sup> was, for a time, so far limited to the facts upon which it was decided, that it could not be considered authority for the broad doctrine for which it was formerly cited;<sup>4</sup> but it has since been reinstated to the full, and the doctrine again laid down that damage done by malice is actionable unless justified by competition or some other lawful cause.<sup>5</sup> Still the tendency and perhaps the weight of authority appear to be opposed to this doctrine, as applied to maliciously procuring another, by persuasion alone, to refuse to contract with the plaintiff.<sup>6</sup>

**236.** Malice in such cases is to be taken in any sense of the word which does not import the use of wrongful means.

**Maliciously  
procuring re-  
fusal to con-  
tract, without  
use of wrong-  
ful means.**

It may accordingly, with some hesitation, be laid down as the better rule that no action lies for procuring a man to refuse to contract with another, where there was no duty to contract, though the procuring was done with notice of the plaintiff's desire to contract and with intent to do him harm, if no wrongful means was employed.<sup>7</sup> For example: The plaintiff's

<sup>1</sup> *Walker v. Cronin*, 107 Mass. 555; *Cases*, 102; *Graham v. St. Charles R. Co.*, 27 L. R. A. 416 (La.); *Temperton v. Russell*, 1893, 1 Q. B. 715, C. A.; *Cases*, 109; *Flood v. Jackson*, 1895, 2 Q. B. 21, C. A. (since reversed; see *infra*).

<sup>2</sup> *Allen v. Flood*, 1898, A. C. 1, reversing *Flood v. Jackson* and overruling (on that point) *Temperton v. Russell*, *supra*.

<sup>3</sup> *Walker v. Cronin*, *supra*.

<sup>4</sup> *Rice v. Albee*, 164 Mass. 88. But see the dissenting opinion of Mr. Justice Holmes in *May v. Wood*, 172 Mass. 11, 14, and *Plant v. Woods*, cited in the next note, and *infra*, p. 121, note 1.

<sup>5</sup> *Plant v. Woods*, 57 N. E. Rep. 1011 (Mass.), Holmes, C. J., dissenting on the ground that the court had gone a little too far that way. But *Plant v. Woods* was, on its facts, a plain case of wrongful means, for there were threats of violence, coercion, and intimidation.

<sup>6</sup> *Ante*, pp. 22, 23.

<sup>7</sup> *Rice v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11; *Boyson v. Thorn*, 98 Calif. 578; *Allen v. Flood*, 1898, A. C. 1. A fortiori is this

declaration alleges that at the time in question he was engaged in the business of manufacturing cotton goods, and had built up a valuable business, but needed more capital therein; that he had entered into negotiations with one W for a partnership, who was to pay \$10,000 for a half interest therein; that the terms of partnership had been agreed to and reduced to writing; and that the articles were about to be signed, when the defendant, knowing the premises, and unlawfully intending to interfere in the execution of the articles to the injury of the plaintiff in his business, unlawfully, maliciously, and unjustifiably persuaded and induced W not to enter into the said contract, and that W accordingly refused to sign the articles; whereby the plaintiff suffered damage set out. This does not show any breach of legal duty by the defendant; there is no allegation of misrepresentation or other wrongful acts, and 'no interference is alleged with an existing business or with existing contracts.'<sup>1</sup> Again: The defendants maliciously, but without using wrongful means, procure the Glengall Iron Company, which theretofore had been employing the plaintiffs by the day, to refuse at the end of a certain day to continue to employ them, the refusal not being a breach of contract or 'other legal duty by the company. The employment would have continued but for what the defendants did; and the plaintiffs have suffered damage. The defendants are not liable, whatever may have been their motive. They had a legal right to procure the Glengall Iron Company to refuse to renew the employment of the plaintiffs, if they used no wrongful means to that end, and malice on

true where the procuring is to refuse to contract with a dishonest debtor, and so preventing him from doing business. *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224. And that too though a number of dealers combine for the purpose. *Id.*

<sup>1</sup> *Rice v. Albee*, 164 Mass. 88, Field, C. J., for the court: 'We do not deem it necessary to consider the cases which relate to a malicious interference with an existing business or with existing contracts, or those which relate to the enticing away of servants actually employed or under contracts of employment, or the enticing away of a wife or husband.' The interference complained of was with an attempt to *extend* the business, not with the running of 'existing business.'

their (the defendants') part towards the plaintiff could not convert that right into a legal wrong.<sup>1</sup>

237. The 'right to contract,' of common speech, plainly is no answer to this doctrine. The phrase is too broad. A has no legal right to contract with B, since B may refuse. A has only a legal right to try to induce B to contract with him.<sup>2</sup> But C has a like legal right, a right to try to induce, and hence to induce, B to contract with *him* in the matter; that is to say, he has a legal right to induce B not to contract with A.<sup>3</sup> That being the case, it seems that it should make no difference what C's motive may be, whether the good motive of desiring to have B contract with *him* or the bad motive of wishing to injure A.<sup>4</sup> 'A man has a [legal] right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium.'<sup>5</sup> If motive is to take part in the matter and modify the result, it must, it seems, be on the dangerous ground of public policy.<sup>6</sup>

238. Would it affect the case if C were joined by others; that is, would it give a right of action to A that two or more

<sup>1</sup> *Allen v. Flood*, 1898, A. C. 1. But see note 1, p. 121, *infra*.

<sup>2</sup> That men have a legal right to refuse to contract, for instance to say that they will not work with men of a particular organization, or of no organization, has scarcely been doubted; it is now at least fairly beyond dispute. *Allen v. Flood*; *Arthur v. Oakes*, 63 Fed. Rep. 310, 317; *Davis v. United Engineers*, 51 N. Y. Sup. 180, Rumsey, J., dissenting.

<sup>3</sup> See *Allen v. Flood*, *supra*, Lord Herschell. The question is not merely whether A has a legal right, but whether C has infringed that right; this he has not done if he had a legal right to do what he did.

<sup>4</sup> The two parts, inducing B not to contract and inducing him to contract with C, the defendant, cannot be spliced together as one indivisible thing to be required, because the latter part, in its connection with the former, is only a motive to it; though alone of course it would not be motive. Such appears to be the effect of *Allen v. Flood*.

<sup>5</sup> *Allen v. Flood*, at p. 138, per Lord Herschell.

<sup>6</sup> *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25, 45, Lord Bramwell, on public policy.

persons *conspired* in inducing B to refuse to contract with him, with intent to injure A? The question is one of difficulty, but it seems that it should be answered in the negative. There would only be a conspiracy to do a lawful thing (if C alone did it, it would not be unlawful, as we have seen), unless the combination itself amounts to the use of 'means.' If to combine be to use 'means,' then the combination or conspiracy may be using wrongful means and hence, with damage, be unlawful.

Effect of conspiracy, as means.

239. To combine in bringing about the object is plainly to use means in one sense of the word; and it is certain that two or more may be able to do harm and so make themselves liable for the damage, where one might not be equal to it.<sup>1</sup> An organ-grinder and monkey before one's window might not be a nuisance, but fifty organ-grinders and monkeys undoubtedly would be. Or to give the classical illustration, one man probably could not hiss an actor off the stage, but a hundred men might do it.<sup>2</sup>

240. The inference has been drawn that to combine and conspire is to use 'means' within the rule under consideration.<sup>3</sup> But the inference is hardly justified. The unlawfulness of the result, where the result is unlawful, is due, not to the means employed, except incidentally, but to doing the act itself, that being a nuisance, trespass, or the like; which would be equally unlawful if done by one person, if one could do it. 'Means,' in the sense of the rule, appears to denote measures, such as misrepresentation, used to bring to

<sup>1</sup> *Lambton v. Mellish*, 1894, 3 Ch. 163; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25, 38, 45, 52, 60; Cases, 80, 93, 98, 99; s. c. 23 Q. B. Div. 598 616, 624. *Lambton v. Mellish* was a case of rival caterers in a public place, trying to outdo each other by 'maddening' noises in getting business.

<sup>2</sup> *Gregory v. Brunswick*, 6 Man. & G. 205, 953. So a combination of men may be necessary to prevent another from obtaining credit with them. *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224.

<sup>3</sup> *Temperton v. Russell*, 1893, 1 Q. B. 715, Lords Esher and Ludlow. See also the intimation of Lord Watson in *Allen v. Flood*, 1898, A. C. 1, 108.



pass a result which one person might thus accomplish; it denotes 'measures, not men.'<sup>1</sup> Combinations may result in coercion, but they do not of themselves amount to coercion or anything else which is wrongful.<sup>2</sup>

241. But a case of malice no doubt may easily be turned into a case of means. A does an act with intent to harm B; that is a plain case of malice. But A does the act with intent to harm B, in order to bring him to terms with himself, A, A's motive being gain to himself; that is quite as plainly a case of the use by A of means to accomplish his purpose. The question then is, whether or not the means are wrongful ones.<sup>3</sup>

## § 2. OF MALICIOUS HINDRANCE OF ONE'S 'EXISTING BUSINESS' OR OCCUPATION.

242. There remains the case of maliciously hindering a person from obtaining contracts for the carrying on of his 'existing business,' where the contracts are such as are necessary to the carrying on of the business, as for instance contracts of employment of men to carry on the manufacture of goods. It is still declared that malicious hindrance of the kind, resulting in

Is this an exceptional case? Conflicting views.

<sup>1</sup> That conspiring to do an act, which is done, is not unlawful as means unless the act would be so without any conspiracy, see *Hutchins v. Hutchins*, 7 Hill, 104; *Cases*, 76; *Van Horn v. Van Horn*, 23 Vroom, 284; 24 Vroom, 514; 27 Vroom, 318; *Schultau v. Bavarian Brewing Co.*, 96 Ky. 224; *Parker v. Huntington*, 2 Gray, 124; *Randall v. Hazelton*, 12 Allen, 412, 414; *O'Callahan v. Cronan*, 121 Mass. 114; *May v. Wood*, 172 Mass. 11, 13; *Rich v. New York Central R. Co.*, 87 N. Y. 382, 394; *Kimball v. Harman*, 34 Md. 407; *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25; *Cases*, 80; *Allen v. Flood*, *supra*; and many other cases. The suggestion that conspiracy is means is new.

<sup>2</sup> Even strikes are not in themselves unlawful. *Arthur v. Oakes*, 63 Fed. Rep. 310, 327; *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25, 47; *Cases*, 80, 95; *Farrar v. Close*, L. R. 4 Q. B. 602, 612.

<sup>3</sup> Accordingly *Temperton v. Russell*, though treated by the court as a case of malice, should have been treated as one of means, regardless of the alleged conspiracy. The true question, it seems, was of the quality of the acts done by the defendants, whether rightful or wrongful. So easy is it to conceal means under a garb of malice.

damage, is actionable, though there was no procuring of breach of contract and no use of wrongful means.<sup>1</sup> For example: The plaintiffs' declaration alleges that the defendant unlawfully, without justifiable cause, molested, obstructed, and hindered the plaintiffs from carrying on their business of manufacturing and selling boots and shoes, with the unlawful purpose of preventing them from carrying on said business, and wilfully persuaded and induced persons who were in the employ of the plaintiffs, and others 'who were about to enter into' their employ, to leave and abandon the same, against the will of the plaintiffs and to their special damage. This states a good cause of action, though there is no allegation that the plaintiffs had any contract of service with such persons; persuading and inducing the men not to accept employment offered them by the plaintiffs, in order to prevent the plaintiffs from carrying on their business, being without justifiable cause and hence malicious and wrongful.<sup>2</sup>

**243.** In the case from which this example was taken it was laid down by the court that a man has the right, that is, the legal right, to enjoy the fruits of his own enterprise, skill, and credit; which was a right to freedom from malicious and

<sup>1</sup> *Walker v. Cronin*, 107 Mass. 555; *Cases*, 102. And see the dissenting opinion of Mr. Justice Holmes, with whom Knowlton and Morton, JJ., agreed, in *May v. Wood*, 172 Mass. 11, 14, where the case is put on still higher ground than in *Walker v. Cronin*, as though the language of that case had not been affected by *Rice v. Albee*, 164 Mass. 88, *supra*. 'I regard it as settled in this Commonwealth,' said the learned judge, 'that an action will lie for depriving a man of custom, that is, of possible contracts, as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is inflicted simply from malevolence and without some justifiable cause, such as competition in trade.' See also *Plant v. Woods*, 57 N. E. Rep. 1011 (Mass.), in which the same doctrine is in effect laid down by the court.

<sup>2</sup> *Walker v. Cronin*, 107 Mass. 555; *Cases*, 102; on demurrer. The only molestation really alleged, it will be noticed, was that the defendant maliciously persuaded and induced the men not to enter, or not to continue in, the plaintiffs' employ. But persuasion may easily run into intimidation. See *Plant v. Woods*, 57 N. E. Rep. 1011 (Mass.).

wanton interference, disturbance, and annoyance. If, it was declared, disturbance or loss came from merely wanton or malicious acts, without the justification of competition or the service of interest or other lawful object, it was a wrong. The proposition appears to have been founded upon a somewhat narrower and more definite one laid down by Lord Holt in 1706, to wit, that where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, an action lies.<sup>1</sup> But Lord Holt's proposition was only a dictum, and does not appear to have been adopted as law in England. Indeed it has been denied to be law, in the recent case in the House of Lords already cited.<sup>2</sup>

244. This last case was, it is true, the converse of the one of the example above given, in this, that in the example the action was brought by an employer for hindering his business, while in the English case the action was by servants. But the hindrance of the servants was a hindrance of them in their means of livelihood. The same is true of a recent American case already cited.<sup>3</sup> This case was indeed stronger than the one in the House of Lords, the procuring being of the breach of a contract. It was an action by a servant against two persons for maliciously procuring her master to discharge her, to her damage; a majority of the court holding that the action would not lie unless wrongful means were employed.<sup>4</sup>

245. There appears then to be narrow ground for any action for maliciously preventing contract, to the prejudice of one's business. The business hindered must have been an 'existing business;' but what difference, in reason, can it make whether a man has

Ground narrowed as to hindrance of business.

<sup>1</sup> Keeble v. Hickeringill, 11 East, 574, note.

<sup>2</sup> Allen v. Flood, 1898, A. C. 1, 132-137, Lord Herschell.

<sup>3</sup> May v. Wood. 172 Mass. 11.

<sup>4</sup> There was also an allegation of conspiracy, which was brushed aside. The court considered that the right of a master to damages for procuring a breach of the contract of service was special, and that the servant had no corresponding right. See post, p. 129.

a business which has been carried on for a long time, or is trying to start a new one? If there be any difference, it should be in favor of the new venture, because of the difficulty of setting it on foot and of the benefit which may result to the community from getting it under way.<sup>1</sup>

<sup>1</sup> As in the very case of *Rice v. Albee* before stated.



PART II.

UNLAWFUL ACTS.

BREACH OF ABSOLUTE DUTY.





## CHAPTER V.

### PROCURING BREACH OF CONTRACT.

*Statement of the duty.* A, having knowledge or notice of the existence of a contract between B and C, owes the duty to B not to procure C, by persuasion, to break his contract, to B's damage.

It should be remembered that cases of this kind, though nominally cases of malice, are not such in reality. The knowledge or notice of the relation, called 'malice,' is only a necessary part of the breach of duty complained of in the sense that danger must be observed or observable (in ordinary cases) to create liability.<sup>1</sup> Proof of malice as a distinct entity is not necessary.<sup>2</sup> The case therefore belongs to this Part II., — Unlawful Acts, regardless of means or malice.

#### § 1. OF MASTER AND SERVANT.

**246.** From very early times it has been actionable by the common law of England for one to entice away another's servants, with notice of the employment; though the term 'servant' at first was used to designate a person employed in menial service,<sup>3</sup> that is, one living with the master as a member of his household or family. But that was because there was then little if any

Enticing servants away:  
extension of  
idea of service.

<sup>1</sup> Ante, pp. 17, 19.      <sup>2</sup> *Allen v. Flood*, 1898, A. C. 1, 121-123, 154.

<sup>3</sup> The term was not applied to the master's children, though they were and are in law his servants, of his household. See *Taylor v. Neri*, infra. The secondary meaning of 'menial' became the common meaning long ago.

In early times of English vassalage a man's menial servants were so much part of his own station in life, or status, that merely to entice them away appears to have been actionable. Comp. L. C. Torts, 227, 290, 291. Secus of his children, until still earlier times of serfdom. *Taylor v. Neri*, infra. But to seduce his daughter was trespass until the nineteenth century.

service that was not of that kind.<sup>1</sup> When in process of time there came to be much service in which the servants were not members of the master's household, the rule was extended accordingly, and deemed to apply to all cases in which the relation of master and servant existed; though not without question.<sup>2</sup> Such is the rule at the present day, both in England and in America.

## § 2. WHAT MUST BE PROVED.

247. The plaintiff accordingly has to prove the enticement from service, with notice, to his damage. Such evidence will entitle him to recover. For example: The defendant entices away from the plaintiff's employment the plaintiff's journeymen shoemakers, working by the piece and not 'menial' servants, with notice of their relation to the plaintiff, to the plaintiff's damage. The defendant is liable.<sup>3</sup> Again: The defendant entices away from the plaintiff's employment, with notice thereof, the plaintiff's piano workmen, working by the piece and not being menial servants, to the plaintiff's damage. The defendant is liable.<sup>4</sup> Again: The defendant entices away the plaintiffs' workmen, engaged generally and

<sup>1</sup> The Statute of Laborers of 25 Edw. 3, stat. 1, may be noticed. The statute grew out of the dearth of laborers caused by the plague, and accordingly related to ploughmen and others doing menial service. This has sometimes been supposed to be the origin of the master's right against third persons, but that appears to be a mistake. The statute was repealed, but the master's right of action has continued, without legislation, to this day. The Statute of Laborers simply added to the law certain provisions not of the common law, as in regard to harboring servants. See *Lumley v. Gye*, 2 El. & B. 216; L. C. Torts, 306, Wightman, J.

<sup>2</sup> See *Ashley v. Harrison*, 1 Peake, 194; s. c. 1 Esp. 48; *Taylor v. Neri*, 1 Esp. 386. In the second case, an action for assaulting an opera singer whereby the plaintiff lost his service, Eyre, C. J., said that he did not think the law extended beyond menial servants, and pointed out that a father could not maintain an action for merely enticing away of his daughter per quod servitium amisit. But it is now well settled that the rule is not confined to the case of menial servants. See *Lumley v. Gye*, 2 El. & B. 216; L. C. Torts, 306, Crompton, J.

<sup>3</sup> *Hart v. Aldridge*, 1 Cowp. 54, a case often followed.

<sup>4</sup> *Gunter v. Astor*, 4 J. B. Moore, 12.

not by the piece, or as journeymen, or as menial servants, in the manufacture of boots and shoes, with notice of the employment, to the plaintiffs' damage. The defendant is liable.<sup>1</sup>

### § 3. OF CONTRACT IN GENERAL.

248. After great discussion it was held in England in 1853 that the master's right in cases like the foregoing is only an example and not an anomalous or a special case; a majority of the Queen's Bench laying down the rule, as new only in the sense that it was then clearly and definitely stated, that to procure a man to break his contract, with notice of the existence of the same, is actionable if the plaintiff, the other party to the contract, suffered harm.<sup>2</sup> For example: The plaintiff's declaration alleges that the plaintiff, being proprietor of a theatre in London, made a contract with an opera singer, one Miss Wagner, whereby she agreed to sing exclusively at the plaintiff's theatre during a certain season; and that the defendant, proprietor of a rival theatre there, knowing the premises, persuaded and induced Miss Wagner to break her contract with the plaintiff, and to refuse to sing at his theatre, to the damage of the plaintiff. The defendant is liable.<sup>3</sup>

249. In the example the court refused to consider whether the party induced to break the contract had already begun performance or not. And the whole deci-

Master's  
right deemed  
only an ex-  
ample: larger  
view.

Performance  
not begun.

<sup>1</sup> Walker v. Cronin, 107 Mass. 555; Cases, 102.

The allegation of malice, and with unlawful purpose to injure the plaintiff in his business, has been omitted from the foregoing statement as surplusage, the malice and the unlawful purpose being found in doing the act with notice of the relation. See ante, p. 128. 'It must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant,' etc. Crompton, J., in Lumley v. Gye, 2 El. & B. 216; L. C. Torts, 306, at p. 311.

<sup>2</sup> Lumley v. Gye, 2 El. & B. 216; L. C. Torts, 306.

<sup>3</sup> Lumley v. Gye, supra, Coleridge, J., dissenting in a long and powerful opinion, holding that the action for procuring breach of contract of service was founded upon the Statute of Laborers, and confined therefore to cases of the relation of master and servant in the ordinary sense.

sion has been reaffirmed in England<sup>1</sup> and followed or approved,<sup>2</sup> but also strongly denied, in America.<sup>3</sup> And it has even been intimated in England that the subject is not altogether closed.<sup>4</sup>

250. Several objections have been raised besides the one that there was no action for procuring breach of contract, **Objection:** except by a master, before the Statute of Laborers **remoteness.** of the middle of the fourteenth century. One of these objections is that the defendant's act is too remote for accountability, — that the defendant cannot be liable for the free, voluntary misconduct of another not acting as his agent or servant. 'The action is not maintainable, as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant.'<sup>5</sup> In other words, the *damnum* was not the natural or legal consequence of the *injuria*.

251. To this objection the answer appears to be, that even if Miss Wagner's act was not likely to result from the defendant's persuasion, the defendant at all events intended that it *should* result, and it did.<sup>6</sup> A may be liable for successfully persuading B to commit a crime or a tort, however improbable it may be that B will yield to the persuasion.<sup>7</sup>

<sup>1</sup> *Bowen v. Hall*, 6 Q. B. Div. 333, Lord Coleridge, C. J., dissenting. See also *Temperton v. Russell*, 1893, 1 Q. B. 714, overruled more or less by *Allen v. Flood*, 1898, A. C. 1.

<sup>2</sup> *Walker v. Cronin*, 107 Mass. 555; *Cases*, 102; *Angle v. Chicago Ry.*, 151 U. S. 1, 13, 14. See *Rice v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11.

<sup>3</sup> *Boyson v. Thorn*, 98 Calif. 578; *Rice v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11. The last case is the converse of the cases of the master's right, being a suit by a servant for procuring the master to break his contract with her and discharge her. A majority of the court held that there was no such converse right of action, unless wrongful means were used.

<sup>4</sup> See *Allen v. Flood*, at pp. 123, 153, 168.

<sup>5</sup> *Wightman, J.*, putting the defendant's contention in *Lumley v. Gye*, *ut supra*.

<sup>6</sup> *Bowen v. Hall*, 6 Q. B. Div. 333, 338, Lord Esher.

<sup>7</sup> 'He who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.' *Erle, J.*, in *Lumley v. Gye*, *supra*.

Intention to have an act done, and procuring it to be done though by persuading another to do it, should bring a man near enough to the act to make him accountable for it; successful endeavor ought to be enough. The fact that the immediate actor is a free agent, under no obligation to be persuaded, should not affect the case. It is settled law that the fact that intervening instruments are human beings, acting of their own will, does not necessarily cut off liability from one back of them.<sup>1</sup> But more directly to the point, a husband can maintain an action against one who induces his wife, without legal cause, to leave him,<sup>2</sup> and conversely a wife can maintain an action against one who similarly persuades her husband to abandon her;<sup>3</sup> and yet the leaving or abandonment is the 'spontaneous' act of the wife or husband, in the same sense in which Miss Wagner's act was spontaneous.

252. The other objection is, that the only duty bearing upon the case is the duty created by the contract. It makes no difference, according to this objection, that the defendant was near enough to cause and did cause the breach of contract, since he violated no duty to the plaintiff; only the party who broke the contract violated such a duty. This objection is more serious. It does not go the length of denying that the defendant owed *any* duty to the plaintiff. It does not deny, and no one would deny, that the defendant owes to the plaintiff in such a case the duty to use no *wrongful means* to procure the breach;<sup>4</sup> it only denies that inducing one, by persuasion merely, to break one's contract is wrongful.

Objection:  
duty one of  
contract only.

253. If this be not presumptively wrongful by clear doctrine of the common law, there will still be the appeal to

<sup>1</sup> Thomas v. Winchester, 6 N. Y. 397; Cases, 567. See ante, pp. 48, 49; post, p. 398.

<sup>2</sup> Winsmore v. Greenbank, Willes, 577; Lumley v. Gye, per Wightman, J.

<sup>3</sup> See the chapter on Seduction, post.

<sup>4</sup> Note that the objection in no way questions the idea that the creation of a right in personam may incidentally or necessarily generate a right in rem.



public policy; and on that point the leaning of opinion appears to be in favor of treating persuasion to break a contract as too dangerous to the public welfare to be permitted. The well-established case of the right of action of a husband or wife against a third person for persuading the other party to the marriage contract to break the same by abandoning the other, if a stronger case, is still not without its force as a precedent. And the same may be said of the case of persuading another to commit a crime or a tort, for the person persuaded may have owed a duty of contract, as of faithfulness in a foreign agency, of which the offence is a breach purposely caused by the defendant. But what difference can it make whether the duty violated by the person persuaded is one of contract or of another kind? Why should there not be a legal duty not to persuade a man to break his contract as well as not to persuade a man to violate his duty to the state or any other duty paramount? Has the supposed distinction anything more to rest upon than the confused notion that a right in personam is inconsistent with a right in rem?<sup>1</sup>

254. Assuming that the right in question exists, will it affect the case that the contract was not enforceable, as for instance because of the Statute of Frauds? Has the plaintiff still a legal right towards the defendant? In cases in which wrongful means have been employed, as where the procuring was by misrepresentation,<sup>2</sup> or by seduction, or by enticing away servants,<sup>3</sup> the courts have held that it makes no difference that the contract was not

<sup>1</sup> That there is no such inconsistency in reality is shown by the fact that to procure breach of contract by means admitted to be of a wrongful nature, such as misrepresentation, is unlawful (if actual damage result). It is everywhere agreed that a right in personam may generate a right in rem. See ante, p. 7.

<sup>2</sup> *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82.

<sup>3</sup> *Evans v. Walton*, L. R. 2 C. P. 15 (distinguishing *Cox v. Muncey*, 6 C. B. N. S. 375, and *Sykes v. Dixon*, 9 Ad. & E. 693); *Harper v. Suffkin*, 7 Barn. & C. 387; *Fitzh. N. B.* 91 G. note by Lord Holt; *Sutton v. Huffman*, 3 Vroom, 58; *Lipe v. Eisenlard*, 32 N. Y. 229; *Bigelow's L. C. Torts*, 292-304.

binding. Such cases have been put upon the ground that the plaintiff has a right to any service which another is willing to give, whether for pay or gratuitously; which accords with what we have already seen touching the nature of legal right.<sup>1</sup>

#### § 4. OF DAMAGE.

255. It is not enough that there has been a breach of contract, though that would of course be enough for an action against the party who had broken the same. For the purpose of an action against a stranger to the contract for procuring the breach, actual damage <sup>Engagement for fixed period.</sup> must be proved. It is not necessary however that there should have been an engagement for a fixed period of time, such as 'for the season;' the action lies as well where no time is fixed, or where the engagement is from day to day, or by the piece.<sup>2</sup> Indeed it has lately been held that specific damage need not be shown in cases in which it appears that some damage, however undefined, must have been sustained;<sup>3</sup> which however is in perfect accord with the legal idea of special damage.<sup>4</sup>

<sup>1</sup> Ante, p. 6.

<sup>2</sup> *Gunter v. Astor*, 4 J. B. Moore, 12; *Hart v. Aldridge*, 1 Cowp. 55; *Lumley v. Gye*, 2 El. & B. 216; s. c. L. C. Torts, 306, 316; *Walker v. Cronin*, 107 Mass. 555; *Cases*, 102, 107.

<sup>3</sup> *Exchange Telegraph Co. v. Gregory*, 1896, 1 Q. B. 147, C. A.

<sup>4</sup> *Ratcliffe v. Evans*, 1892, 2 Q. B. 524, 528, Bowen, L. J.

## CHAPTER VI.

### SEDUCTION.

*Statement of the duty.* A owes to B the duty not to seduce B's female child and servant,<sup>1</sup> capable of service, or B's female ward and servant, capable of service, towards whom B stands in loco parentis, or to entice away or alienate the affections of B's wife or husband.

The term 'seduction,' in its broad legal sense, includes the enticing away of servants and enticing away or alienating the affections of a husband or a wife; hence the use of the single word to cover all that is contained in the 'Statement of the duty.' The subject of enticing servants away has been disposed of in the two next preceding chapters; what is left for the present chapter is seduction in the more common sense,<sup>2</sup> including alienation of affection in the marital relation.

Various meanings of term 'seduction.'

#### § 1. OF ENTICING AWAY CHILDREN.

256. It is doubtful whether any action lies by a parent for the mere enticing away of his minor daughter (or son), or for harboring the child after notice that the departure is without the parent's consent.<sup>3</sup> There must be either a real loss of service, or a loss of service by way of seduction; in the first case the ordinary relation of master and servant, already disposed of, exists between the

Parent's right of action: loss of service.

<sup>1</sup> This was trespass formerly. See Chitty, Pleading, ii. 643, note.

<sup>2</sup> See *State v. Bierce*, 27 Conn. 319; *Carlisle v. State*, 73 Miss. 387; *Bradshaw v. Jones*, 103 Tenn. 331, defining the term.

<sup>3</sup> *Taylor v. Neri*, 1 Esp. 386 (referred to by Crompton, J., in *Lumley v. Gye*, 2 El. & B. 216, and L. C. Torts, 306), where Eyre, C. J., said that if a daughter left her father's service no action for loss of service could be maintained. His lordship apparently meant, against one who enticed

parent and child; the second case is the subject now reached for consideration.

§ 2. OF SEDUCTION STRICTO SENSU: PARENT AND CHILD:  
WHAT MUST BE PROVED, ETC.

257. A parent's right of action against one who has seduced or enticed away his child is at common law<sup>1</sup> the right of action of a master; that is, it turns upon the existence of the relation of master and servant, not merely upon parental authority or kinship.<sup>2</sup> **Master and servant as ground of the right.** The plaintiff need not prove notice of the relation of master and servant between himself and the child,<sup>3</sup> but must prove the performance of some service, however slight, by the child accordingly, and the seduction. The right of action lasts as long as that relation lasts; it does not terminate necessarily when the child becomes of age.<sup>4</sup>

258. In England the parent's right of action terminates whenever the child leaves the parent's house with intention not to return.<sup>5</sup> That rule does not obtain in this country.<sup>6</sup> **Absence of child from parent: will of child.** The father's right of action here does not depend upon the will of the child; notwithstanding the child's absence from her father's

the daughter away; but even if he meant against the daughter the result would be the same, for if the daughter was not liable the enticing away would not be wrongful unless the daughter was giving real service gratuitously. Qu. as to civil liability for kidnapping the plaintiff's young child?

<sup>1</sup> The rule has in effect been changed by statute in Kansas. *Anthony v. Norton*, 60 Kans. 341, reviewing the cases. So perhaps elsewhere by 'reformed procedure.'

<sup>2</sup> *Middleton v. Nichols*, 62 N. J. 636, 637.

<sup>3</sup> *Chitty, Pleading*, ii. 642, note. See *Allen v. Flood*, 1898, A. C. 1, 154. The defendant may be bound to know whether she was of age or not. If not of age, she would presumptively be in the father's service, it seems. Seduction of a young child should be a presumptive wrong to the father.

<sup>4</sup> *Infra*, p. 137.

<sup>5</sup> *Dean v. Peel*, 5 East, 45. See *Griffiths v. Teetgen*, 15 C. B. 344; *Manley v. Field*, 7 C. B. N. S. 96; *Hedges v. Tagg*, L. R. 7 Ex. 283.

<sup>6</sup> *Middleton v. Nichols*, *supra*; *Milliken v. Long*, 188 Penn. St. 411.

house at the time of the seduction, though she intends not to return, the father's right of action is not affected. This is true though she was at the time in the service of another with her father's consent. For example: The defendant seduces the plaintiff's daughter under the following circumstances: The daughter, at the age of nineteen, goes, with the consent of her father the plaintiff, to live with a relative, for whom she works when she pleases, receiving pay for her labor. While there, and still under age, she is seduced and got with child by the defendant, and returns to her father and is cared for. She had no intention, but for the seduction, to return. The defendant is liable.<sup>1</sup>

259. That however is the extent of the American rule. If the power of the parent over the child was gone at the time of the seduction, whether by his own act or by act of the law, the seducer has violated no legal duty to him;<sup>2</sup> though there has been some conflict of authority in regard to the application of this doctrine to the case of a return of the daughter after the seduction, a point to be referred to later.

260. It is considered however that, if the parent's control over his child was divested by fraud, he may treat it, on discovering the fraud, as never having been abandoned, and maintain an action against the seducer. For example: The defendant hires the plaintiff's daughter from his service with intent to seduce her, and by this means obtains possession of her person, and seduces her. The plaintiff is entitled to recover as if the daughter had been seduced while in his own service.<sup>3</sup>

261. There must have been ability to render service at the time of the seduction;<sup>4</sup> though whether actual services were being rendered or not, or what the extent or value of the services, has nothing to do with the

Control of  
parent taken  
away by  
fraud.

Ability to  
serve.

<sup>1</sup> *Martin v. Payne*, 9 Johns. 387; s. c. L. C. Torts, 286.

<sup>2</sup> *Middleton v. Nichols*, 62 N. J. 636, 638.

<sup>3</sup> *Speight v. Oliviera*, 2 Stark. 493; *Dain v. Wycoff*, 7 N. Y. 191, 194.

<sup>4</sup> *Hall v. Hollander*, 4 B. & C. 660.

right of action,<sup>1</sup> and in many cases may have little if anything to do with the amount recoverable. Loss of service is indeed of the gist of the action, by the common law; but when ability to perform service has been shown, damages may be given not merely for any actual loss of service but also for the disgrace inflicted upon the plaintiff and his family,<sup>2</sup> the amount which may be given varying more or less with the station in life of the parties and being subject to the reasonable judgment of the jury.<sup>3</sup>

**262.** The father's right of action continues, as has already been intimated, after the daughter has come of age, if the relation of master and servant is still in operation between them. If the parent continue to exercise authority over the daughter after her majority, and she continue to submit, she is still his servant, though not under an actual engagement to serve him; and seduction under such circumstances is a breach of legal duty to the parent. For example: The defendant seduces the plaintiff's daughter, aged twenty-two years. Prior to and at the time of the seduction, the daughter has been living part of the time with her brother, who resides about a mile from her father's house, and part of the time with her father. She has not received wages from her brother, and when at home has worked for her mother, the plaintiff buying her clothing. The daughter is the plaintiff's servant, and the defendant is liable.<sup>4</sup>

**263.** It has been held in England that the seduction should be followed by pregnancy or disease to entitle the plaintiff to recover.<sup>5</sup> The American rule is, that

<sup>1</sup> See *Grinnell v. Wells*, 7 Man. & G. 1044, note to the case.

<sup>2</sup> *Terry v. Hutchinson*, L. R. 3 Q. B. 599; *Bartley v. Richtmyer*, 4 Comst. 38; L. C. Torts, 294.

<sup>3</sup> The only limit upon their action as to the amount, as in many other cases, is that it must not be excessive, under all the facts of the case taken together.

<sup>4</sup> *Sutton v. Huffman*, 3 Vroom, 58; *Rist v. Faux*, 4 Best & S. 409 (Ex. Ch.); *Evans v. Walton*, L. R. 2 C. P. 615. See ante, p. 135.

<sup>5</sup> *Eager v. Grimwood*, 1 Ex. 61. But see *Evans v. Walton*, L. R. 2 C. P. 615, 617.



where the proper effect of the connection is an incapacity to labor, by reason of which the plaintiff loses the services of his daughter and servant, the loss of such services entitles the plaintiff to recover against the seducer. The same principle which gives a master an action where the connection causes pregnancy applies to the case of sexual disease, and, indeed, to all cases where the proper consequence of the act of the defendant is a loss of health resulting in an incapacity for such service as could have been rendered before. For example: The defendant seduces the plaintiff's minor daughter, by reason of which, without becoming pregnant (or being affected with sexual disease), she suffers general injury in health, so that it becomes necessary for the plaintiff to send her away for her recovery; whereby he incurs expense and loses his daughter's services. The defendant is liable.<sup>1</sup>

**264.** If however the loss of health be caused by mental suffering not the necessary effect of the seduction, especially if produced by subsequent causes, the loss of service is not the effect, in contemplation of law, of the defendant's act; and hence the action cannot be maintained. For example: The defendant seduces the plaintiff's minor daughter, and subsequently abandons her, in consequence of which she suffers such distress of mind as to bring illness upon her, and incapacitate her for performing services for the plaintiff; no pregnancy or disease resulting by direct consequence of the seduction. The defendant is not liable to the plaintiff.<sup>2</sup>

**265.** If a loss of service follow as the proper effect of the defendant's act, it is held to be immaterial, so far, that he accomplished his purpose without resorting to seductive arts not necessary. seductive arts. The willingness of the daughter cannot affect the parent's right of action for loss of service;<sup>3</sup> though the ready consent of the young woman might be

<sup>1</sup> *Abrahams v. Kidney*, 104 Mass. 222; *Boyle v. Brandon*, 13 M. & W. 738.

<sup>2</sup> *Boyle v. Brandon*, *supra*; *Abrahams v. Kidney*, *supra*. See *ante*, p. 28.

<sup>3</sup> *Damon v. Moore*, 5 Lans. 454. See *Broadhurst v. Jones*, 103 Tenn. 331.

ground for mitigation of other damages,<sup>1</sup> especially if she was notoriously a loose character.

**266.** What has been said in the preceding paragraphs concerning the parent's right of action for loss of service must be understood of the father's claim to damages. Claim of mother. During his guardianship of the daughter, the right of action belongs to him alone. Should he be removed by the law from his natural position of authority, or should he die during the child's minority, the question arises of the mother's right of action against the seducer. It is clear if the guardianship of the child has been given to her, she has a right of action for the loss of service; though it may be doubted if at the present time the mere relation of guardian, apart from that of parent, would, in all cases, afford a right of action for the child's seduction, a point to be further adverted to in the next section.

**267.** A difficulty arises where the mother, upon the death of the father, or his removal from the guardianship, simply continues to exercise authority over her daughter, and to receive her (voluntary) obedience, without having received an appointment as guardian. The mother's right of action has sometimes been supposed to turn upon the question of her right to require the child's support in such a case. It is now well settled in America however that so long as the daughter continues to give obedience and service to her mother, the latter has a right of action for a wrongful interruption of the daughter's position of servant. For example: The defendant seduces the minor daughter of the plaintiff, a widow. The daughter, having previously been in the service of the defendant, and then in the service of D, returns from the latter person to her mother to aid her during sickness in the family. While thus with her mother for a day or two, she is got with

<sup>1</sup> *Hogan v. Cregan*, 6 Rob. 138 (N. Y.), criticised in *Damon v. Moore*, supra. Compare *Winter v. Henn*, 4 Car. & P. 494, and *Forster v. Forster*, 33 L. J. Prob. & M. 150, n., as to criminal conversation.

child by the defendant. The defendant has violated a legal duty to the plaintiff, and is liable in damages.<sup>1</sup>

268. The authority from which this example has been given went one step further, and decided that the mother's right of action was not affected by the fact that the daughter, when seduced, was actually in the service of another, so long as she indicated a willingness to consider her mother as still entitled to her assistance.

269. There is conflict of American authority concerning the mother's right of action in such cases where the daughter, seduced while out at service, returns to her mother, and is supported and cared for during her sickness. The doubt is in regard to the mother's relation to her daughter apart from any interference of the law in giving custody to her. Unless the mother is considered to have the legal right to require her daughter's service, it is difficult to see how she could be entitled to sue for the seduction in a case of that kind.<sup>2</sup>

270. The child is not entitled, apart from statute, to sue for her own seduction, since she has consented to the act; though if the seduction was effected under a promise of marriage, which is afterwards broken, she may recover damages for the seduction. But the action is then for the breach of promise of marriage, and not for the seduction. For like reason the parent is barred if he consented or virtu-

<sup>1</sup> *Gray v. Durland*, 51 N. Y. 424. In *Abrahams v. Kidney*, 104 Mass. 222, the mother sued and recovered.

<sup>2</sup> The mother's right of action in such cases is denied in *South v. Denniston*, 2 Watts, 474; *Roberts v. Connelly*, 14 Ala. 235. To the same general effect, *Freto v. Brown*, 4 Mass. 675; *Worcester v. Marchant*, 14 Pick. 510. It is supported in *Sargent v. —*, 5 Cowen, 106. It is obvious that the rules of law as to cases like those stated must remain in uncertainty and conflict until the nature of the mother's authority is definitely settled. It is still more doubtful whether the mother of a daughter not born in lawful wedlock could maintain an action in a case like that of the text. The mother would not be even guardian for nurture in such a case. See *Regina v. Clarke*, 7 El. & B. 186; *In re Ullee*, 53 L. T. N. S. 711, affirmed 54 L. T. N. S. 286, Ch. Div. But statutes concerning the mother's rights are coming into existence in various States.

ally consented to the act. For example: The defendant is permitted by the plaintiff to visit his daughter as a suitor, after notice that he is a married man and a libertine; the defendant, on inquiry by the plaintiff as to this matter, representing that his wife is an abandoned character, and that he will soon obtain a divorce from her, and then marry the plaintiff's daughter. The defendant afterwards, while continuing his visits at the plaintiff's house, seduces the young woman. The plaintiff is deemed not entitled to recover for the seduction.<sup>1</sup>

### § 3. OF GUARDIAN AND WARD: WHAT MUST BE PROVED, ETC.

271. Not only the parent, but any one standing as guardian, in loco parentis, and receiving, to his own benefit, the services of a child, can maintain an action for loss of service on proof that the defendant has interrupted the same and deprived the plaintiff of the benefit of the service, however slight. For example: The defendant seduces the plaintiff's niece, the parents of the young woman being dead, and the plaintiff standing towards her in loco parentis. The defendant is liable, though the young woman has property left her by her parents, and performs but slight service for the plaintiff.<sup>2</sup>

272. The right of action in all such cases, and in cases strictly of guardian and ward, depends, it seems, upon the fact that the guardian or person standing in loco parentis is receiving the services (however slight) to his own benefit. If the guardian has merely the supervision of the ward and her income, while she lives elsewhere, or performs service for herself, the guardian simply

Guardian's  
claim.

Ground of  
right of  
action.

<sup>1</sup> Reddie v. Scoolt, Peake, 240. Compare cases of criminal conversation, p. 146.

<sup>2</sup> Manvell v. Thomson, 2 Car. & P. 303. And, as in the case of an action by the father, damages may be given beyond the value of the services. Irwin v. Dearman, 11 East, 23. It is not necessary, it seems, to prove knowledge of the guardianship. Compare Chitty, Pleading, ii. 642, note.

receiving her wages and acting as her trustee, it is improbable that he can sue for her seduction.<sup>1</sup>

273. On the whole, the chief difference between the ordinary case of master and servant on the one hand, and that of parent and child and guardian and ward on the other, appears to be that in the former case the services must be substantial, and the damages would (probably) be confined to actual loss suffered; whilst in the other two cases the services may be nominal, such as might be presumed where persons so related live together.<sup>2</sup>

#### § 4. OF HUSBAND AND WIFE: WHAT MUST BE PROVED, ETC.

274. To entice away, or alienate the affections of, one's wife, though without knowledge of the existence of the marital relation,<sup>3</sup> is a civil wrong for which the offender is liable to the injured husband.<sup>4</sup> The statement indicates what is to be proved. The gist of the action however is not the loss of assistance, but the loss of the consortium of the wife,<sup>5</sup> which term implies an exclusive right, against an invader, to her affection, companionship, and aid.<sup>6</sup> It is indeed held to be unnecessary that there should be any separation or pecuniary injury; in which respect the action resembles that of a parent for the seduction

<sup>1</sup> In early times the ward was the guardian's chattel. *Lumley v. Gye*, 2 El. & B. 216, 250, 257.

<sup>2</sup> For this paragraph the author is indebted to his learned friend, Mr. R. T. Wright, of the University of Cambridge, England.

<sup>3</sup> Chitty, Pleading, ii. 642, note.

<sup>4</sup> Under changes partly silent, and partly effected by recent statutes, the wife, in the converse case, now has a corresponding right of action. *Westlake v. Westlake*, 34 Ohio St. 621; *Bennett v. Bennett*, 116 N. Y. 584; *Jaynes v. Jaynes*, 39 Hun, 40; *Warner v. Miller*, 17 Abb. N. C. 221; *Breiman v. Paasch*, id. 249; *Baker v. Baker*, 16 Abb. N. C. 293; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Foot v. Card*, 57 Conn. 247; *Seaver v. Adams*, 19 Atl. Rep. 776. See however *Lynch v. Knight*, 9 H. L. Cas. 577; *Van Arnam v. Ayres*, 67 Barb. 544. Further, see *Cooley*, Torts, 267, 2d ed.

<sup>5</sup> The old form of allegation in a case of master and servant was 'per quod servitium amisit;' in a case of husband and wife, 'per quod consortium amisit.'

<sup>6</sup> See Black. Com. iii. 139, 140; *Bigaouette v. Paulet*, 134 Mass. 123.



of his daughter. For example: The defendant, by false insinuations against the plaintiff, and other insidious wiles, so prejudices and poisons the mind of the plaintiff's wife against him, and so alienates her affections from him, as to induce her to desire and seek to obtain, without just cause, a divorce; and by his false insinuations and wiles succeeds in persuading the wife to refuse to recognize the plaintiff as her husband. The defendant is liable; though no actual absence of the wife is caused.<sup>1</sup>

275. This example, it will be observed, does not go to the extent of declaring a person liable for enticing away or corrupting the affections of the wife by reason of charges against the husband which are *true*; but there can be little doubt that such an act would be a breach of duty to the husband.<sup>2</sup> The constancy and affection of a wife are all the more valuable to him if his conduct is bad.

Charges  
which are  
true.

276. A difference is deemed to exist however between the act of a parent and that of other persons with regard to persuading a wife to leave her husband. In the case of one not a parent, it is certainly not necessary that bad motives should have inspired the act.<sup>3</sup> It does not follow however that mere advice to a married woman by a stranger to leave her husband, upon representations by the wife, would be unlawful; advice in such a case is one thing, enticement is another.

Persuasion  
by parent.

277. But it has been stated to be no breach of duty to the husband for a parent, upon information that his daughter is treated with cruelty by her husband or is subjected to other gross indignities such as would justify a separation, to go so far as to persuade her to depart from her husband; though it subsequently appear that the parent's persuasion was based

<sup>1</sup> Heermance *v.* James, 47 Barb. 120.

<sup>2</sup> See Bromley *v.* Wallace, 4 Esp. 237. The conduct of the husband could be shown only in mitigation of damages. *Id.*

<sup>3</sup> See Hatcheson *v.* Peck, 5 Johns. 196; Bennett *v.* Smith, 21 Barb. 439.



on wrong information.<sup>1</sup> It is held that bad motives must have actuated the parent in order to make him liable.<sup>2</sup> This seems to mean that the parent must either have enticed his daughter to leave or to stay away out of ill-will towards her husband, and not by reason of any good ground for their separation; or that he must have some end to gain of personal benefit to himself. In the absence of facts of this character, the parent is deemed not liable for persuading his daughter to absent herself from her husband on information justifying (if true) a divorce or even a departure of her own motion; though a stranger in blood would be liable.

**278.** Any person who receives into his house a married woman, who has abandoned her husband, or suffers her to stay there, after receiving notice from the husband not to harbor her, is deemed, presumptively, to violate a duty which he owes to the husband.<sup>3</sup> But any one may, notwithstanding such notice, shelter the wife out of humanity, on reasonable representations by her that she has left her husband because of cruel treatment by him. For example: The defendant receives the plaintiff's wife into his house, upon representations of ill treatment by her husband; and he continues to permit her to remain there after notice from the plaintiff not to do so. The defendant is not guilty of a breach of duty to the plaintiff.<sup>4</sup>

**279.** Liability for harboring must (probably) be limited to cases in which the defendant has clear notice that the wife's act in coming to him, or in staying with him, is intended as a separation by her from her husband, and a repudiation of his claims as such. A man cannot at the present day be liable in damages for allowing a married woman to remain in his house a few days after notice not to do so, if she deny

<sup>1</sup> *Bennett v. Smith*, 21 Barb. 439, 443.

<sup>2</sup> *Hutcheson v. Peck*, *supra*.

<sup>3</sup> *Winsmore v. Greenbank*, Willes, 577; s. c. L. C. Torts, 328. See *Addison*, Torts, 905, 4th ed.

<sup>4</sup> *Philp v. Squire*, Peake, 82.

that she has abandoned her husband and claim that she is merely visiting, or that she is away from home for some other temporary and reasonable purpose. The defendant's liability, when it exists, rests upon the ground that he is a party to the unlawful purpose of depriving the plaintiff of the benefit of some advantage embraced under the designation of the consortium of his wife.<sup>1</sup> If the wife were disposed to stay an unreasonable length of time after notice from the husband, that fact would perhaps be sufficient to cause him to suspect her true purpose, and to render him liable in case he continued to permit her to remain.

280. It is settled law that the mere fact of receiving another's wife is not unlawful, even though no explanation whatever be offered.<sup>2</sup> There must be an enticing or harboring with reference to a wrongful separation. It is not enough even that the defendant take the plaintiff's wife to the defendant's house, upon request by her, unless he has notice that she is abandoning her husband; though he has been required by the plaintiff not to harbor her. For example: The defendant and the plaintiff are farmers and neighbors, residing about two miles apart. Their wives are relatives, and the plaintiff's wife often visits the defendant's; the defendant taking her to his house in his wagon. The plaintiff's wife on one occasion being so at the defendant's house, the plaintiff gives the defendant written notice not to harbor her, but to return her to his residence from which he (the defendant) has taken her. The defendant having stopped with the wife near her husband's house, she goes to enter it, but finds the door locked, and returns to the defendant, requesting him to take her to his house. The defendant shows her the notice, and advises her not to go, but she makes light of the matter, and is taken to the defendant's house. The next day the defendant carries her home; and the plaintiff brings suit for the harboring. The action is not

<sup>1</sup> *Winsmore v. Greenbank*, Willes, 577; *Hutcheson v. Peck*, 5 Johns. 196; *Schuneman v. Palmer*, 4 Barb. 225.

<sup>2</sup> *Barnes v. Allen*, 1 Keyes, 390; *Schuneman v. Palmer*, supra. See also *Winsmore v. Greenbank*, supra.

maintainable; the defendant not having attempted to influence the wife to leave her husband.<sup>1</sup>

281. So much for enticing away a man's wife. The common law gives a right of action also for 'criminal conversation' with one's wife;<sup>2</sup> and upon the same ground  
**Criminal intercourse:** as that for enticing the wife away from her husband, to wit, the loss of consortium.<sup>3</sup> It arises accordingly without regard to the infliction of pecuniary damage.<sup>4</sup>

282. It follows that upon separation, by articles of agreement, the husband, having voluntarily parted with his wife's consortium, cannot maintain an action for criminal conversation with his wife.<sup>5</sup> But if the separation was without any relinquishment by the husband of his right to the society of his wife, the action is maintainable. For example: The defendant, having entered into a contract for the support of the plaintiff's wife at his (the defendant's) house, the wife goes there under the agreement, and the defendant seduces her. The act is a breach of duty to the plaintiff, for which the defendant is liable.<sup>6</sup>

283. The mere fact of the husband's infidelity to his wife does not change the nature of the defendant's act in seducing  
**Husband's infidelity.** and debauching her; though it may possibly, in contemplation of law, affect its enormity. For example: The defendant seduces and has criminal intercourse with the plaintiff's wife. Proof is offered by the defendant that the plaintiff had shown the greatest indifference and want of affection towards his wife; that while she lay dangerously ill at Y, the plaintiff (a surgeon in the

<sup>1</sup> *Schuneman v. Palmer*, 4 Barb. 225.

<sup>2</sup> *Weedon v. Timbrell*, 5 T. R. 357; *Harvey v. Watson*, 7 Man. & G. 614; *Bigaouette v. Paulet*, 134 Mass. 123.

<sup>3</sup> *Weedon v. Timbrell*, 5 T. R. 357.

<sup>4</sup> *Wilton v. Webster*, 7 Car. & P. 198.

<sup>5</sup> *Harvey v. Watson*, 7 Man. & G. 644.

<sup>6</sup> See *Chambers v. Caulfield*, 6 East, 244. *Weedon v. Timbrell* has been limited to this extent. See further *Barbee v. Armstead*, 10 Ired. 530.

navy), though his vessel was at Y, and he landed almost daily, was often at the door of the house where his wife lay sick, without visiting her, or showing any anxiety or concern for her; and at the same time that he had been guilty of adultery and had contracted a venereal disease. This is no defence to the action;<sup>1</sup> though it might be considered in mitigation of damages.<sup>2</sup>

284. If however the husband was accessory to his own dishonor, the case is different; he could not complain of an injury to which he had consented.<sup>3</sup> For example: The plaintiff allows his wife to live as a prostitute, and the defendant then has intercourse with her. This is no breach of duty to the plaintiff.<sup>4</sup>

Husband's  
consent :  
negligence.

285. Mere negligence in regard to the wife's behavior; inattention or dulness of apprehension; or even permission of indecent familiarity in the husband's presence; such things are held insufficient to bar a recovery for criminal conversation with the wife, though they may be shown in reduction of damages. Unless the conduct of the husband amount to consent to the defendant's act of intercourse, the defendant is liable.<sup>5</sup>

286. It follows from what has been said that condonation of the wife's offence does not excuse the man who seduced her; the sole consequence of the condonation is that the husband is barred from obtaining a divorce. For example: The defendant has criminal inter-

Condonation.

<sup>1</sup> *Bromley v. Wallace*, 4 Esp. 237, overruling *Wyndham v. Wycombe*, id. 16.

<sup>2</sup> *Id.*; *Rea v. Tucker*, 51 Ill. 110.

<sup>3</sup> 'Volenti non fit injuria.'

<sup>4</sup> See *Cibber v. Sloper*, cited 4 T. R. 655; *Hodges v. Windham*, Peake, 39; *Sanborn v. Neilson*, 4 N. H. 501.

<sup>5</sup> See *Rea v. Tucker*, 51 Ill. 110; *Sanborn v. Neilson*, 4 N. H. 501; *Foley v. Peterborough*, 4 Doug. 294; *Greenleaf*, Evidence, ii. § 51. But on the amount of damages in such cases see *Duberley v. Gunning*, 4 T. R. 651. And as to that case see *Jones v. Sparrow*, 5 T. R. 257; *Chambers v. Caulfield*, 6 East, 244; *Blunt v. Little*, 3 Mason, 102, 106; *Bigelow's L. C. Torts*, 338.

course with the plaintiff's wife, and, when fatally sick, the wife discloses the fact to her husband. The plaintiff continues to care for his wife kindly until her death. The defendant is liable.<sup>1</sup>

<sup>1</sup> *Wilton v. Webster*, 7 Car. & P. 198; *Bernstein v. Bernstein*, 1892, 2 Q. B. 375; *Powers v. Powers*, 10 P. D. 174; *Sanborn v. Neilson*, 4 N. H. 501.

## CHAPTER VII.

### SLANDER AND LIBEL.

*Statement of the duty.* A owes to B the duty not to publish of B (1) defamation in its nature actionable per se, (2) defamation in its nature not actionable per se, to the damage of B.

Defamation is false imputation upon one's self, character, or reputation, in the way of slander or libel.

Slander is defamation published orally, or in like manner.

Libel is defamation published by writing, print, or figure.

The imputation may be made upon one as a man, or upon one in one's vocation.

Defamation is published when one makes the imputation to or in presence of another, or when one causes it to come to the notice of another. Publication made without authority is publication only by the one making it.

Whenever language is spoken of as defamatory it is understood to be false.

What the phrase 'defamation in its nature actionable per se' means will be made known by the proposition of law following, and the consideration of its parts.

#### § 1. OF DEFAMATION ACTIONABLE PER SE: WHAT MUST BE PROVED.

**287.** The general proposition of law is, that the first of the two duties above stated is violated by A, and B can maintain an action against him, without proving special damage, on proof of the publication by A of words, language, or figure of a false and defamatory character concerning B, in any of the following ways: (1) Where A imputes to B the commission of a criminal offence punishable by imprison-



ment, or other corporal penalty, in the first instance,<sup>1</sup> clearly if the offence is indictable and involves moral turpitude, or is punishable by an infamous punishment;<sup>2</sup> (2) where A imputes to B the having a contagious or infectious disease of a disgraceful kind; (3) where A makes a derogatory imputation concerning B in respect of his office, business, or occupation;<sup>3</sup> (4) where the defamation is a libel. Whether any one believed the defamatory charge is immaterial in regard to the right of action.<sup>4</sup> Each of the foregoing classes of defamation must be examined.

## § 2. OF THE INTERPRETATION OF LANGUAGE.

288. Before proceeding to the consideration of any of these classes of breaches of duty, it should be observed that, subject **Natural sense of language.** perhaps to one exception, the language or figure complained of is to be understood presumptively in its natural and usual sense, i. e. in the sense in which the persons who heard or read or saw it, as men of ordinary intelligence, would understand it.<sup>5</sup> It is not to be construed in a milder sense ('mitiori sensu') merely because it is capable,

<sup>1</sup> Pollock, *Torts*, 219, 2d ed. It is not enough that the offence is punishable by 'fine in the first instance, with possible imprisonment in default of payment.' *Id.*, referring to *Webb v. Beavan*, 11 Q. B. D. 609. The offence charged need not in England be indictable. *Webb v. Beavan*.

<sup>2</sup> *Brooker v. Coffin*, 5 Johns. 188; post, p. 155.

<sup>3</sup> *Lovejoy v. Whitcomb*, 174 Mass. 586; *Morasse v. Brochu*, 151 Mass. 567; *O'Brien v. Times Publishing Co.*, 21 R. I. 256.

<sup>4</sup> *Bishop v. Journal Newspaper Co.*, 168 Mass. 327.

<sup>5</sup> *Hankinson v. Bilby*, 16 M. & W. 442; *Simmons v. Mitchell*, 6 App. Cas. 156; *Thompson v. Sun Publishing Co.*, 91 Maine, 203; *Reid v. Providence Journal Co.*, 20 R. I. 120; *Clute v. Clute*, 101 Wis. 137. See *Gates v. New York Recorder Co.*, 155 N. Y. 228; *Richmond v. Loeb*, 19 R. I. 120. Whether the words in slander are legally defamatory or not is, commonly at least, a question of law. *Capital Bank v. Henty*, 7 App. Cas. 741. See *Thompson v. Sun Publishing Co.*, *supra*; also *Craig v. Pyles*, 101 Ky. 593; *Robertson v. Edelstein*, 104 Wis. 440; *Schurick v. Kollman*, 50 Ind. 336; *Blake v. Smith*, 19 R. I. 476; *Loranger v. Loranger*, 115 Mich. 681; these being cases of vile words applied to women, some actionable, others not. In criminal cases of libel the jury were made the judges whether the language was libellous or not, in England,

by a forced construction, of being interpreted in an innocent sense. For example: The defendant publishes of the plaintiff the following words: 'You are guilty of the death of D.' This is an imputation of the commission of murder, and is not to be construed 'mitiori sensu.'<sup>1</sup>

289. It should however be clear, in order to make language actionable without proof of damage, that the imputation was slanderous or libellous (according to its nature) within the meaning of some one of the above stated classes. If this be not the case, it will not be deemed a breach of the duty; and this too whether the question of interpretation come before the court or before the jury. In one case at least the interpretation adopted has been apparently contrary to the understanding of men of ordinary intelligence; and that is where an imputation is made of what would ordinarily be understood as a crime, but the language of which does not necessarily import a crime in the legal sense. An imputation of a criminal nature, which does not import a crime in the legal sense, is not actionable per se.<sup>2</sup> For example: The defendant publishes of the plaintiff the following words: 'He has taken a false oath against me in Squire Jamison's court.' This is deemed not to be an imputation of the commission of perjury;<sup>3</sup> the term 'perjury' sig-

Legal sense of  
charges of  
criminal sort.

by Fox's Act, 32 Geo. 3, c. 60. The same practice prevails in this country. The practice under Fox's Act has been adopted in England in civil cases of libel also; in some of our States the same is true (*Heller v. Pulitzer Publishing Co.*, 153 Mo. 205), in others not.

<sup>1</sup> *Peake v. Oldham*, 1 Cowp. 275; Cases, 122.

<sup>2</sup> *Ward v. Clark*, 2 Johns. 10. See *Crone v. Angell*, 14 Mich. 340; *Brown v. Hanson*, 53 Ga. 632. 'The offence need not be specified . . . at all if the words impute felony generally. But if particulars are given, they must be legally consistent with the offence imputed.' Pollock, Torts, 220, 2d ed., referring to *Jackson v. Adams*, 2 Bing. N. C. 402. See *Murphy v. Olberding*, 107 Iowa, 547; *Stitzell v. Reynolds*, 67 Penn. St. 54; *Brown v. Myers*, 40 Ohio St. 99; *Underhill v. Welton*, 32 Vt. 40. But see *Stroebel v. Whitney*, 31 Minn. 384. The reason for the strictness of the rule no doubt is, that the plaintiff seeks to recover without proof of actual damage.

<sup>3</sup> *Ward v. Clark*, supra; Cases, 128.

nifying the taking of a false oath knowingly, before a court of justice, with reference to a cause pending.

290. Apart from this particular exception in regard to the legal sense of a crime, it follows from what has been said that **Indirect use of language.** it is immaterial whether the defamatory charge be affirmative and direct, or indirect so as to be matter of inference merely, or that it is insinuating<sup>1</sup> or ironical, or that it is made in allegory or other artful disguise. It is enough that the charge would naturally be understood to be defamatory by men of average intelligence.

### § 3. OF THE PUBLICATION OF DEFAMATION AND SPECIAL DAMAGE.

291. It should be noticed that defamation is not published when addressed only to the plaintiff,<sup>2</sup> no one else being present<sup>3</sup> who could understand the language.<sup>4</sup> That **What publication means.** is, the language or representation cannot in such a case be actionable as defamation. And this is true, though the alleged wrong be directly followed by great dejection of mind on the part of the plaintiff, and consequent sickness and inability to carry on his usual vocation, and expense attending upon his restoration to health or upon the employment of help to carry on his business. For example: The defendant says to the plaintiff, 'You have committed adul-

<sup>1</sup> See *Haynes v. Clinton Printing Co.*, 169 Mass. 512.

<sup>2</sup> Or to another by his direction. *Railroad v. Delaney*, 102 Tenn. 289.

<sup>3</sup> *Sheffill v. Van Deusen*, 13 Gray, 304. See *Marble v. Chapin*, 132 Mass. 225, 226. Communication of defamation by the defendant to his wife has lately been held in England not to be publication. *Wennhak v. Morgan*, 20 Q. B. D. 635. But an accusation of the husband in the presence of his wife (or the converse) would be a publication. *Nolan v. Traber*, 49 Md. 460; *Hawver v. Hawver*, 78 Ill. 412; *Duval v. Davey*, 32 Ohio St. 604. See *Wenman v. Ash*, 13 C. B. 836, which suggests a doubt in regard to accusations of the wife made to the husband.

<sup>4</sup> See *Hurt v. Weines*, 27 Iowa, 134. As to translations of language see *Wilson v. Noonan*, 27 Wis. 598; *Monson v. Lathrop*, 96 Wis. 386, 389. Publication may be effected by negligence. *Loibl v. Breidenbach*, 78 Wis. 49; *Monson v. Lathrop*, *supra*; *Vitzetelly v. Mudie's Library*, 1900, 2 Q. B. 170.

tery with F.' The plaintiff, a farmer, suffers immediate distress of mind and body, becomes sick and unable to attend to his work, his crops suffer, and he is compelled to employ extra help to carry on necessary work. The defendant has not violated any legal duty to the plaintiff.<sup>1</sup>

292. Indeed, if the language complained of be not actionable per se (that is, if it be not actionable without the proof of special damage), the fact that the publication of the defamation occurred in the presence of a third person who, by authority, reported it to the plaintiff with such a result as that stated in the foregoing example, would not, it is held, make the defamer liable.<sup>2</sup>

293. This however proceeds upon the ground that the effect of distress of mind, followed by sickness, is not such damage as the law requires when the defamation is not actionable per se. The rule of law upon this subject is, that defamation not actionable per se may be a breach of duty if it be attended with special damage. But special damage (and damage of a general nature as well) must be the natural and usual result of the wrong complained of, as effect follows cause; and, as it is sometimes declared in effect, mental distress with its consequences will not satisfy this doctrine, effect upon the mind and then upon health being largely due to individual peculiarities, and not being certain or uniform.<sup>3</sup> Or, better still, damage resulting from *fear* of injury to reputation, or from

Mental distress not damage.

<sup>1</sup> Compare *Terwilliger v. Wands*, 17 N. Y. 54, 63, and *Wilson v. Goit*, id. 442, which, taken together, justify the example.

<sup>2</sup> *Terwilliger v. Wands*, 17 N. Y. 54, 63, reaffirmed in *Wilson v. Goit*, id. 442, and overruling *Bradt v. Towsley*, 13 Wend. 253, and *Fuller v. Fenner*, 16 Barb. 333. But see *McQueen v. Fulgham*, 27 Texas, 463.

<sup>3</sup> Such damages are commonly spoken of as 'remote.' Compare *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222; *Spade v. Lynn R. Co.*, 168 Mass. 285; s. c. 172 Mass. 488. Some cases are contra. See 168 Mass. 290. But the authorities are not quite consistent; mental distress being treated as ground for damages if a right of action is *otherwise* shown. See ante, p. 28; *Warren v. Boston & M. R.*, 163 Mass. 484, 487; *Spade v. Lynn R. Co.*, 172 Mass. 488, 490, *Holmes, J.* (see s. c. 168 Mass. 285); *Pugh v. London Ry. Co.*, 1896, 2 Q. B. 248; *Harvard Law Rev.*, December, 1896, p. 239.

wounded feelings, is not damage to reputation; that can only be injured when it has been defamed before a third person.

294. The damage complained of must then in all cases, whether general or special, have been sustained through the action of a third person. Special damage may so result in several ways, so as to make the publication of defamation actionable when it would not be actionable per se; as by the loss of a marriage. For example: The defendant falsely charges the plaintiff, an unmarried female, with unchastity, in the presence and hearing of C, to whom the plaintiff is engaged to be married. C, in consequence of the charge, terminates the engagement. The defendant is liable to the plaintiff.<sup>1</sup>

Act of a third person necessary: examples.

295. The same would be true of the loss of the consortium of a wife<sup>2</sup> and no doubt of a husband.<sup>3</sup> The same would also be true of the refusal to the plaintiff of civil entertainment at a public house.<sup>4</sup> So of the fact that the plaintiff has been turned away from the house of her uncle, and charged not to return until she shall have cleared up her character;<sup>5</sup> and so in general of the loss by the plaintiff even of gratuitous hospitable entertainment.<sup>6</sup>

296. The special feature of the law of slander and libel however consists in this, that defamation may be actionable per se; and the consideration of the various phases of such defamation will now follow. Let it be clearly observed, that in defamation arising under any of the heads now to be separately examined, the plaintiff establishes the breach of duty,

<sup>1</sup> See *Terwilliger v. Wands*, 17 N. Y. 54, 60. But see *McQueen v. Fulgham*, 27 Texas, 463.

<sup>2</sup> *Bigaouette v. Paulet*, 134 Mass. 123.

<sup>3</sup> See *Lynch v. Knight*, 9 H. L. Cas. 577; *Jaynes v. Jaynes*, 39 Hun, 40; *Warner v. Miller*, 17 Abb. N. C. 221; *Breiman v. Paasch*, 7 Abb. N. C. 249.

<sup>4</sup> *Olmsted v. Miller*, 1 Wend. 506. See *Moore v. Meagher*, 1 Taunt. 39.

<sup>5</sup> *Williams v. Hill*, 19 Wend. 305.

<sup>6</sup> *Id.*; *Moore v. Meagher*, 1 Taunt. 39; ante, p. 6.



and consequently his right to recover, by simply proving publication.<sup>1</sup> In cases of defamatory publications not falling under the following heads, the plaintiff must also prove damage; that is the only difference between the two classes of cases.

#### § 4. OF THE IMPUTATION OF HAVING COMMITTED A CRIME.

297. Different rules have obtained in different States concerning the nature of the offence the false imputation of which is actionable per se. In some States it has been laid down that, unless the offence charged is indictable and involves moral turpitude,<sup>2</sup> or unless it is one the punishment of which is infamous, there is no right of action without proof of special damage. A punishment is infamous at common law which disqualifies the offender from being a witness in the courts; a punishment is not infamous when, for instance, it is named in the same category with the punishment of trivial offences, such as vagrancy, begging, and fortune telling, and a charge of such an offence would not be actionable per se. For example: The defendant publishes of the plaintiff the charge 'She is a common prostitute.' The punishment of this offence, where charged, is classed with the punishment of trivial offences such as those just mentioned. The defendant is not liable without proof of special damage.<sup>3</sup>

What sort of charge actionable: conflict of authority.

<sup>1</sup> *Webb v. Beavan*, 11 Q. B. D. 609. On the question who are publishers see *Youmons v. Smith*, 153 N. Y. 214 (liability of a printer).

<sup>2</sup> *Lodge v. O'Toole*, 20 R. I. 405.

<sup>3</sup> *Brooker v. Coffin*, 5 Johns. 188; *Cases*, 126; *Davis v. Carey*, 141 Penn. St. 314; *McQueen v. Fulgham*, 27 Texas, 463; *Underhill v. Welton*, 32 Vt. 40; *Pollard v. Lyon*, 91 U. S. 225. See also as to vile words against a woman, *Craig v. Pyles*, 101 Ky. 593; *Schurick v. Kollman*, 50 Ind. 336; *Andres v. Koppenheaver*, 3 Serg. & R. 255. Perhaps charges of crime punishable by imprisonment in a state prison would cover this class of cases. Common-law punishments of the pillory, stocks (?), and the like were infamous; but these are of the past. Ex parte *Wilson*, 114 U. S. 417. Punishment of simple assaults or batteries is not infamous. *Andres v. Koppenheaver*, supra; *Billings v. Wing*, 7 Vt. 439.



298. In other States probably, as in England, it would be enough that the crime was punishable in the first instance by imprisonment.<sup>1</sup> In still other States it is not necessary that the offence should be punishable by imprisonment at all, if the offence is punishable and disgraceful; this rule being laid down: Whenever an offence has been charged conviction of which subjects the offender to a punishment which, though not ignominious, would bring disgrace, the accusation, if false, is actionable per se.<sup>2</sup> The offence accordingly need not be indictable.

299. It is not necessary anywhere that the accusation should be of the commission of a crime in the strict sense; **Charge of** enough, even where the first rule above stated **misdemeanor.** prevails, that the imputation is of the commission of a misdemeanor if the offence involves moral turpitude.<sup>3</sup> For example: The defendant falsely publishes of the plaintiff the words 'You have removed my landmarks, and cursed is he that removeth his neighbor's landmark.' The words are actionable per se.<sup>4</sup>

300. The authorities, further, are not altogether in harmony in regard to the question whether it is necessary that **Danger of** the charge, if true, would subject the object of it **punishment or** to punishment, or whether the test in this partic- **degradation** ular is the degradation involved; but the weight **— which the** of authority favors the latter as the test, assuming **test.** that the offence charged is in law a crime. Although then the charge shows that the punishment has already been suffered, and does not render the plaintiff liable to indictment, the degradation involved in the (false) accusation makes the

<sup>1</sup> Ante, p. 150, note.

<sup>2</sup> *Miller v. Parish*, 8 Pick. 384; *Brown v. Nickerson*, 5 Gray, 1 (imputing drunkenness to a woman in a single instance). See *Meyer v. Schleichler*, 29 Wis. 646; *Frisbie v. Fowler*, 2 Conn. 707; *Zeliff v. Jennings*, 61 Texas, 458, 466.

<sup>3</sup> *Young v. Miller*, 3 Hill, 21; *Smith v. Smith*, 2 Sneed, 473; *Reck v. Stitzel*, 21 Penn. St. 522. See *Andres v. Koppenheaver*, 3 Serg. & R. 255.

<sup>4</sup> *Young v. Miller*, supra. But the meaning of 'moral turpitude' is not fixed.

defendant liable.<sup>1</sup> For example: The defendant falsely says of the plaintiff, 'Robert Carpenter [the plaintiff] was in Winchester jail, and tried for his life, and would have been hanged had it not been for L, for breaking open the granary of farmer A, and stealing his bacon.' The defendant is liable.<sup>2</sup> Again: The defendant falsely says of the plaintiff, 'He was arraigned at Warwick for stealing of twelve hogs, and, if he had not made good friends, it had gone hard with him.' The defendant is liable.<sup>3</sup> Again: The defendant falsely says of the plaintiff, 'He is a convict, and has been in the Ohio penitentiary.' The plaintiff can maintain an action.<sup>4</sup>

### § 5. OF THE IMPUTATION OF HAVING A CONTAGIOUS OR INFECTIOUS DISEASE OF A DISGRACEFUL KIND.

**301.** By the early common law a charge to come under this head must have been of having the leprosy, or the plague, or the syphilis. At the present time the duty has come to be so far enlarged as to make it actionable to publish false accusations concerning another of the having any disease of a contagious or infectious nature involving disgrace. For example: The defendant falsely charges the plaintiff with having the gonorrhœa. This is actionable per se.<sup>5</sup>

**302.** This doctrine of law proceeds upon the ground that charges of such a kind tend to exclude a person from society; and the rule requires the charge to be made in the present

<sup>1</sup> Of course if the charge is in writing, it is libellous. *Morrissey v. Telegram Publishing Co.*, 19 R. I. 124.

<sup>2</sup> *Carpenter v. Tarrant*, Cas. temp. Hardw. 339. The plaintiff always alleges falsity of the charge, but need not prove it.

<sup>3</sup> *Halley v. Stanton*, Croke Car. 268.

<sup>4</sup> *Smith v. Stewart*, 5 Barr, 372. It would be otherwise if the words were true. *Baum v. Clause*, 5 Hill, 199. A person is no longer a felon after suffering the punishment of felony: so that the fact that he was once a felon would not sustain a plea of the truth of a charge of felony. *Leyman v. Latimer*, 3 Ex. Div. 352.

<sup>5</sup> *Watson v. McCarthy*, 2 Kelly, 57. See *Bloodworth v. Gray*, 7 Man. & G. 334.

tense. To accuse another falsely of having had a disgraceful disease is not actionable without proof of special damage. For example: The defendant says of the plaintiff, 'She has *had* the pox.' The defendant is not liable though the charge be false, unless the plaintiff prove special damage.<sup>1</sup>

# § 6. OF AN IMPUTATION AFFECTING THE PLAINTIFF IN HIS OFFICE, BUSINESS, OR OCCUPATION.

**303.** In order that an imputation may in law be said to affect a man injuriously under this head, and be actionable per se, it should have a natural tendency to harm him in his occupation. It is not enough that it may possibly so injure him. If it has not a natural tendency to injure him, that is, if it would not be the usual effect of the charge to injure the plaintiff in his occupation, as by causing discharge, the plaintiff cannot recover without proving special damage. For example: The defendant publishes of the plaintiff, a clerk to a gas-light company, the words, 'You are a disgrace to the town, unfit to hold your situation for your conduct with harlots. You are a disgrace to the situation you hold.' The plaintiff cannot recover without proof of actual damage, the language not having a natural tendency to cause the plaintiff's discharge from his employment.<sup>2</sup>

**304.** Defamation has a natural tendency to injure the plaintiff in his office, business, or occupation, within the meaning of the rule, when for instance it strikes at his qualification for the performance of the duties of the place, or alleges some misconduct or negligence in the course of transacting these duties,<sup>3</sup> or business embarrassment or want of credit in the case of a merchant.<sup>4</sup> For example: The defendant

<sup>1</sup> See *Carslake v. Mapledoram*, 2 T. R. 473; s. c. L. C. Torts, 84.

<sup>2</sup> *Lumby v. Allday*, 1 Tyrwh. 217; Cases, 131. See *Morasse v. Brochu*, 151 Mass. 567, 576.

<sup>3</sup> *Id.*; *Camp v. Martin*, 23 Conn. 86.

<sup>4</sup> *McIntyre v. Weinert*, 195 Penn. St. 52.

charges the plaintiff, a clergyman, holding the office of pastor of a church, with incontinence. This is ground of an action.<sup>1</sup> Again: The defendant says of the plaintiff, a lawyer, the words having relation to the plaintiff's professional qualifications, 'He is a dunce.' This may perhaps be treated as a breach of the defendant's legal duty to the plaintiff.<sup>2</sup>

**305.** When the defamation complained of does not show on its face that it was published of the plaintiff in relation to his occupation, this must be made to appear;<sup>3</sup> though even then, as has been stated, the defamation will not be actionable unless it had a natural tendency to injure the plaintiff in his occupation, in the sense already explained. In cases however in which the imputation is alleged to have been made of the plaintiff in his occupation, when the same does not have the natural tendency mentioned, it may be shown by the plaintiff that the defamation *was* published under circumstances which bring the case within the rule of liability. But without such evidence, the plaintiff must fail. For example: The defendant charges the plaintiff, as a physician, with incontinence. This does not imply disqualification, or necessarily professional misconduct; and, without evidence connecting the imputation with the plaintiff's professional conduct, he cannot recover.<sup>4</sup>

**306.** If the imputation in itself come within the rule of liability under this head, it matters not that it was published of a servant, even one acting in a menial capacity.

Servants.

For example: The defendant falsely speaks the following of the plaintiff, a menial servant, before the latter's master, 'Thou art a cozening knave, and hast cozened thy

<sup>1</sup> Gallwey v. Marshall, 9 Ex. 294.

<sup>2</sup> Peard v. Jones, Croke Car. 382. It is doubtful whether a court would now treat such a statement as actionable. To call a lawyer a 'cheat' is held actionable. Rush v. Cavenaugh, 2 Barr, 187. Further see Goodenow v. Tappan, 1 Ohio, 60; Doyley v. Roberts, 3 Bing. N. C. 835.

<sup>3</sup> Ayre v. Craven, 2 Ad. & E. 2.

<sup>4</sup> Id.

master of a bushel of barley.' The defendant is liable to the plaintiff.<sup>1</sup>

**307.** It is probably actionable to impute disqualification of a person holding a merely honorary or confidential office, not of emolument.<sup>2</sup> It certainly is so to impute to **Honorary office.** such a person misconduct in the office.<sup>3</sup> For example: The defendant says of the plaintiff, who holds a public office of mere honor, touching his office, 'You are a rascal, a villain, and a liar.' This is a breach of the duty under consideration.<sup>4</sup>

**308.** In all cases included under the present section, it is necessary that the plaintiff should have been in the exercise **Exercise of vocation.** of the duties of the particular vocation at the time of the alleged publication of the defamation.<sup>5</sup> For example: The defendant says of the plaintiff, who had been a lessee of tolls at the time referred to by the defendant, 'He was wanted at T; he was a defaulter there.' The words are not actionable per se.<sup>6</sup>

## § 7. OF AN IMPUTATION TENDING TO DISINHERIT THE PLAINTIFF.

**309.** If the words tend to impeach a present title of the plaintiff, the action, though commonly called an action for **Doubt in regard to such cases.** *slander* of title, is not properly speaking an action of slander; as has already been stated, such a case is ground for a special action, governed by rules of law distinct from those of defamation.<sup>7</sup>

**310.** Cases of actions for defamation tending to defeat an expected title are rare, and appear to have been confined to

<sup>1</sup> *Seaman v. Bigg*, Croke Car. 480.

<sup>2</sup> *Onslow v. Horne*, 3 Wils. 186.

<sup>3</sup> *Id.*

<sup>4</sup> *Aston v. Blagrove*, Strange, 617.

<sup>5</sup> *Bellamy v. Burch*, 16 M. & W. 590; *Gallwey v. Marshall*, 9 Ex. 294. See *Ritchie v. Widdemer*, 59 N. J. 290.

<sup>6</sup> *Bellamy v. Burch*, *supra*. Some of the old cases are *contra*, but they were overruled.

<sup>7</sup> See *ante*, pp. 86-89.

charges impeaching the legitimacy of birth of an heir apparent. Such an imputation has been deemed actionable, as being likely to cause the plaintiff's disherison.<sup>1</sup> But that is unsound doctrine, and has met with no favor in modern times. The reason is plain; the act complained of is no violation of any legal right, since the heir apparent can have no legal right to the inheritance. The ancestor owns the estate, and may do as he will with it.<sup>2</sup> Damage must be proved.

§ 8. OF AN IMPUTATION CONVEYED BY WRITING, PRINTING, OR FIGURE; THAT IS, OF LIBEL.

311. The four preceding sections exhaust the possible heads of oral defamation, actionable per se; that is, of slander. Libellous defamation may also be conveyed in any of the four ways above considered; but it may also be conveyed in other ways. A libel is a writing, print, picture, or effigy, calculated to bring one into hatred, ridicule, or disgrace.<sup>3</sup>

312. The definition shows that the law of libel is of wider extent than that of slander. Many words when written or printed become actionable per se which, if they had been orally published, would not have been actionable without proof of special damage. And besides these there is the whole class of defamatory representations, such as picture and effigy, which in their nature are incapable of oral publication. Whether the distinction is well founded or not, the manner of the publication, as libel, makes it actionable.<sup>4</sup> For example: The defendant writes and publishes of the plaintiff the following: 'I sincerely pity the man that can so far forget what is due not only to himself, but to others, who, under the cloak of religious and spiritual

<sup>1</sup> *Humphrys v. Stanfeild*, Croke Car. 469.

<sup>2</sup> *Hoar v. Ward*, 47 Vt. 657; *Onslow v. Horne*, 3 Wils. 188.

<sup>3</sup> *Hollenbeck v. Hall*, 103 Iowa, 214; *McDermott v. Union Credit Co.*, 76 Minn. 84, 87.

<sup>4</sup> *Thorley v. Kerry*, 4 Taunt. 355; *Cases*, 135; *McDermott v. Union Credit Co.*, 76 Minn. 84; *Haynes v. Clinton Printing Co.*, 169 Mass. 512. See *Call v. Hayes*, id. 586.



reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods.' The plaintiff can maintain an action for libel.<sup>1</sup> Again: The defendant prints the following of the plaintiff: 'Our army swore terribly in Flanders, said Uncle Toby; and if Toby was here now, he might say the same of some modern swearers. The man at the sign of the Bible [the plaintiff] is no slouch at swearing to an old story.' The imputation is libellous, though not importing perjury.<sup>2</sup> Again: The defendant prints the following of the plaintiff: 'Mr. Cooper [the plaintiff] will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there.' The publication of this language is deemed libellous.<sup>3</sup>

**313.** At common law, no immunity is conferred upon the proprietors, publishers, or editors of books, newspapers, or other prints, for the publication of defamation. **Publishers of books, newspapers, etc.** They are liable for the publication of libellous matter in their prints, though the publication may have been made without their knowledge or even against their orders. This is not true of news-vendors.<sup>4</sup> And it is held that if the alleged libel were of such a nature that a man of common intelligence could not know that it was intended for a libel, and it was not in fact known that it was, neither the editor nor the proprietor of the printing establishment, or of the print, would be liable.<sup>5</sup>

**314.** Legislation in various States has touched the subject of newspaper libel more or less.

## § 9. OF THE TRUTH OF THE CHARGE.

**315.** The truth of the charge, whether the charge was made orally or by printed or written language, if fully

<sup>1</sup> *Thorley v. Kerry*, supra.

<sup>2</sup> *Steele v. Southwick*, 9 Johns. 214.

<sup>3</sup> *Cooper v. Greeley*, 1 Denio, 347.

<sup>4</sup> *Emmens v. Pottle*, 16 Q. B. Div. 357; *Cases*, 141.

<sup>5</sup> *Smith v. Ashley*, 11 Met. 367.

proved,<sup>1</sup> is, in the absence of statute,<sup>2</sup> a defence to an action for damages for the publication of alleged defamation, though malicious and not reasonably believed to be true.<sup>3</sup> Evidence of such a fact shows indeed that the charge is not legally defamatory. A person has no right to a false character; and his real character suffers no damage, such at least as the law recognizes, from speaking the truth.

The truth an absolute defence, not affected by malice.

316. This rule appears to go to the extent of justifying a party in publishing of another the fact that he has suffered the penalty of the law for the commission of crime, even though he may have been pardoned therefor and have since become a good and respectable citizen. For example: The defendant publishes of the plaintiff the statement that the latter had several years ago stolen an axe. That is true, though, after conviction thereof, the plaintiff was pardoned, and has since become a trusted citizen and an office-holder. The accusation is deemed justifiable in law.<sup>4</sup>

317. Belief in the truth of the accusation however is not a defence,<sup>5</sup> though the law allows the defendant to show it in mitigation of damages.<sup>6</sup> The charge being renewed in the allegation that it was true, must be fully made out by the defendant.<sup>7</sup> And this is equally true of the editors and publishers of books, newspapers, or periodicals, as of other persons.<sup>8</sup>

<sup>1</sup> See *Murphy v. Olberding*, 107 Iowa, 547, charge of crime; *Neilson v. Jensen*, 56 Neb. 430. If the charge contains particulars, all must be established if the truth is set up. See the cases just cited. It is a dangerous defence to plead, for to fail in establishing it shows malice, in the absence of statute. See *Odgers, Slander and Libel*, 178.

<sup>2</sup> There are statutes upon the subject in some of the States, probably in most of the States as to criminal prosecutions for libel.

<sup>3</sup> *McCloskey v. Pulitzer Publishing Co.*, 152 Mo. 339.

<sup>4</sup> *Baum v. Clause*, 5 Hill, 199. See *Rex v. Burdett*, 4 B. & Ald. 314, 325.

<sup>5</sup> *Campbell v. Spottiswoode*, 3 Best & S. 769; *Smith v. Johnson*, 69 Vt. 231.

<sup>6</sup> *Odgers, Slander*, 302, 589.

<sup>7</sup> *Murphy v. Olberding*, 107 Iowa, 547.

<sup>8</sup> *Campbell v. Spottiswoode*, *supra*.

318. The truth of effigy, picture, or sign, so far as such may relate to the physical person of the party intended, and **Truth of effigy or picture.** not to his character, is (probably) no justification of a malicious publication. A man is not responsible for his physical peculiarities, and may well invoke protection of the law against one who will parade them before the public.<sup>1</sup>

### § 10. OF PRIVILEGED COMMUNICATIONS: MALICE.

319. The plaintiff in an action for defamation is entitled to recover upon proof of the publication (with special damage if the case does not fall under one of the four heads); proof of malice, in other words malice as an entity, is not necessary, in any sense of the term, to make a case. It is indeed common to say that malice is presumed or implied upon proof of the publication; but that means nothing, and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice, touching the making a prima facie case, is only a name arbitrarily applied; it is simply a fiction.

320. If this were all, the result would be that, unless the defendant could prove the truth of the charge, he would be liable. But this would be to lay an embargo upon the freedom of speech not to be tolerated. **Occasion may justify defamatory publication.** There are circumstances under which men must be permitted to speak their convictions, however erroneous; the law could not but permit, and hence does permit it.<sup>2</sup> There are, in a word, occasions in which one

<sup>1</sup> Compare *Pollard v. Photographic Co.*, 40 Ch. D. 345, 353, enjoining display of photograph; *Hanfstaengl v. Empire Palace*, 1894, 2 Ch. 1; *Hanfstaengl v. Newnes*, 1894, 3 Ch. 109. But see *Dockrell v. Dougall*, 78 Law T. Rep. 840; *Atkinson v. Doherty*, 80 N. W. Rep. (Mich.) 285, denying the so-called right of privacy.

<sup>2</sup> The doctrine of privileged communications is only a special example of a great law of privilege pertaining to human affairs generally; to wit, the right to inflict harm upon another in just so far as may reasonably be deemed necessary for one's own protection, or for the protection

is excused for publishing what would otherwise be actionable defamation.<sup>1</sup> The publication of the charge in such cases is said to be 'privileged;' the charge itself being termed a privileged communication.

321. Privileged communications are of two kinds: absolutely privileged and *prima facie* privileged communications.<sup>2</sup> Absolute privilege imports that the privilege cannot be overturned by evidence that the publication was made with malice (as an entity); *prima facie* privilege, that the privilege may be overturned by such evidence. Here, in answer to a *prima facie* privilege, set up in defence, is the domain of malice, as a subject of proof, in regard to the right of action for defamation.

Kinds of  
privilege.

322. Apart from statute, absolute privilege is confined to the State, and that too to its three departments, legislative, executive<sup>3</sup> and judicial; such privilege being justified only upon grounds of necessity. First, of statements made in judicial proceedings. Whatever is said orally, or stated in writing, in the course of and duly relating to such proceedings by those concerned therein, is absolutely privileged. According to recent English authority, it matters not whether the language was material or relevant, or not; it is deemed to be against public policy to permit any inquiry in regard to that.<sup>4</sup> It is enough if it relates to the cause before the court. For example: Counsel for the defendant, in the course of arguing a criminal cause, makes base insinuations against the prosecution of another, where that is proper. So far others must yield, or the vindication of rights in many cases would be an empty name; but further no one is required to give way.

Absolute privilege: what it includes: proceedings of the courts.

<sup>1</sup> *Merivale v. Carson*, 20 Q. B. Div. 279, 280; Cases, 144, Lord Esher pointing out that what all men may do is no privilege.

<sup>2</sup> *Hastings v. Lusk*, 22 Wend. 410; Cases, 151; *Shelfer v. Gooding*, 2 Jones, 175.

<sup>3</sup> Including, it seems, the chief executive of a city, in his official communications. *Trebilcock v. Anderson*, 117 Mich. 39; *Wachsmuth v. Merchants' Bank*, 96 Mich. 427.

<sup>4</sup> *Munster v. Lamb*, 11 Q. B. Div. 588 (counsel); *Scott v. Stansfield*, L. R. 3 Ex. 220 (judge); *Seaman v. Netherclift*, 2 C. P. Div. 53 (witness); *Henderson v. Broomhead*, 4 H. & N. 569 (statements in pleadings).

tor in relation to the evidence given, which insinuations would be actionable if not privileged. No action can be maintained for making them; no inquiry into their bearing upon the case will be allowed.<sup>1</sup> Again: A witness on the stand, after examination, volunteers a statement in vindication of himself, which contains a charge of crime against a stranger to the trial. This is not actionable.<sup>2</sup>

**323.** Formerly relevancy appears to have been regarded in England;<sup>3</sup> and in this country it is generally laid down that the language used, in order to be absolutely **Relevancy.** privileged, must either have been legally relevant or must have been believed to be relevant. This has been laid down of the language of parties,<sup>4</sup> of counsel,<sup>5</sup> of witnesses,<sup>6</sup> of jurymen,<sup>7</sup> and of pleadings.<sup>8</sup> For example: The defendant, in the argument of his own cause in court, falsely charges perjury upon the plaintiff, the charge not being relevant, or believed by the defendant to be relevant, to any question before the court. The defendant is liable.<sup>9</sup> Again: The defendant, during the deliberations of a jury of which he is a member, held in the jury room, concerning their verdict in a suit brought by the present plaintiff, says he would not believe the plaintiff under oath, and accuses him of hav-

<sup>1</sup> *Munster v. Lamb*, 11 Q. B. Div. 588.

<sup>2</sup> *Seaman v. Netherclift*, supra.

<sup>3</sup> *Hoar v. Wood*, 3 Met. 193, 198; *Hastings v. Lusk*, 22 Wend. 410; *Cases*, 151, 156-159; *Hodgson v. Scarlett*, 1 B. & Ald. 232.

<sup>4</sup> *Hoar v. Wood*, supra.

<sup>5</sup> *Hastings v. Lusk*, supra; *Youmans v. Smith*, 153 N. Y. 214; *Marsh v. Ellsworth*, 50 N. Y. 309; *McDavitt v. Boyer*, 169 Ill. 475, 483; *Hoar v. Wood*, supra; *McLaughlin v. Cowley*, 127 Mass. 316, 319; *Rice v. Coolidge*, 121 Mass. 393; *Jennings v. Paine*, 4 Wis. 358; *Morgan v. Booth*, 13 Bush, 480.

<sup>6</sup> *McDavitt v. Boyer*, supra; *White v. Carroll*, 42 N. Y. 161; *Barnes v. McCrate*, 32 Maine, 442; *Calkins v. Sumner*, 13 Wis. 193; *Lea v. White*, 4 Sneed, 111; *Storey v. Wallace*, 60 Ill. 51; *McLaughlin v. Cowley*, supra; *Rice v. Coolidge*, supra. See *Acre v. Starkweather*, 118 Mich. 214.

<sup>7</sup> *Dunham v. Powers*, 42 Vt. 1.

<sup>8</sup> *McLaughlin v. Cowley*, supra; *Wyatt v. Buell*, 47 Cal. 624; *Garr v. Selden*, 4 Comst. 91; *Johnson v. Brown*, 13 W. Va. 71.

<sup>9</sup> *Hastings v. Lusk*, 22 Wend. 410; *Cases*, 151.

ing obtained an insurance upon property by fraud and afterwards committing perjury in a suit for the insurance money. This is not legally relevant, but the defendant acts honestly believing it to be so and that he is discharging his duty in the matter. The plaintiff cannot recover.<sup>1</sup>

**324.** The protection extends to the allegations contained in affidavits made in the course of a trial,<sup>2</sup> even though the persons making them be not parties to the cause;<sup>3</sup> and to statements of a coroner holding an inquest.<sup>4</sup> How far the  
privilege  
extends. In a word, it applies apparently to all statements made in the real discharge of duty in court.<sup>5</sup>

**325.** The law upon this subject has been thus (in substance) generalized: No action either for slander or libel can be maintained against a judge, magistrate, or person sitting in a judicial capacity over any court, judicial, military,<sup>6</sup> or naval, recognized by and constituted according to law; nor against suitors, prosecutors, witnesses, counsel, or jurors, for anything said or done relative to the matter in hand, in the ordinary course of a judicial proceeding, investigation, or inquiry, civil or criminal, by or before any such tribunal, however false and malicious it may be.<sup>7</sup>

**326.** A like rule of law to that by which defamatory statements made in the course of judicial proceedings are privileged governs all statements and publications made in Proceedings of  
the Legislature. the course of the proceedings of the Legislature.<sup>8</sup> The occasion is deemed to afford an absolute justification for

<sup>1</sup> *Dunham v. Powers*, 42 Vt. 1.

<sup>2</sup> *Garr v. Selden*, 4 Comst. 91.

<sup>3</sup> *Henderson v. Broomhead*, 4 H. & N. 569.

<sup>4</sup> *Thomas v. Churton*, 2 Best & S. 475.

<sup>5</sup> *Goodenow v. Tappan*, 1 Ohio, 60; *Dunham v. Powers*, *supra*.

<sup>6</sup> *Jekyll v. Moore*, 2 Bos. & P. N. R. 341; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255; s. c. 7 H. L. 744, 752 (witness); *Dawkins v. Saxe-Weimar*, 1 Q. B. D. 499.

<sup>7</sup> *Starkie, Slander and Libel*, 184 (4th ed. by Folkard); *Munster v. Lamb*, 11 Q. B. Div. 588, and cases cited.

<sup>8</sup> *Odgers, Slander*, 187.



the use of language otherwise actionable, so long as it relates to the proceedings under consideration. No member of the Legislature is liable in a court of justice for anything said by him in the transaction of the business of the House to which he belongs, or in which he has duties to perform, however offensive the same may be to the feelings or injurious to the reputation of another.<sup>1</sup>

327. This privilege however is absolute only within the walls of the House, or of such other places as committees are authorized to occupy.<sup>2</sup> It is not personal, but local. A member who publishes slander or libel generally, outside of such locality, stands, it seems, on the same footing with a private individual.<sup>3</sup> For example: A member of Parliament prints and circulates generally a speech delivered by him in the House, containing defamatory language of the plaintiff. This is a breach of duty.<sup>4</sup>

328. The same protection is extended to persons presenting petitions to the Legislature, and with the same restriction. The printing and exhibiting a false and defamatory petition to a committee of the Legislature, and the delivery of copies thereof to each member of the committee, is justifiable, unless perhaps the petition is a mere sham, fraudulently put forth for the purpose of defaming an individual. But a publication to any others than the members of the committee, or at any rate to others than members of the Legislature, removes the protection, and renders the author liable.<sup>5</sup>

<sup>1</sup> See *Ex parte Wason*, L. R. 4 Q. B. 573; *Commonwealth v. Blanding*, 3 Pick. 304, 314; *Coffin v. Coffin*, 4 Mass. 1, a very important case; *Hastings v. Lusk*, 22 Wend. 410, 417; s. c. L. C. Torts, 121, 124; *McGaw v. Hamilton*, 181 Penn. St. 108.

<sup>2</sup> *Coffin v. Donnelly*, 6 Q. B. D. 307. See *Belo v. Wren*, 63 Texas, 686, irregular and irresponsible committee.

<sup>3</sup> See however *Coffin v. Coffin*, *supra*, as to words not in the course of business.

<sup>4</sup> *Rex v. Abingdon*, 1 Esp. 226; *Rex v. Creevey*, 1 Maule & S. 273; *Stockdale v. Hansard*, 9 Ad. & E. 1. As to private circulation of speeches among constituents, see *Wason v. Walter*, L. R. 4 Q. B. 73, 95.

<sup>5</sup> *Lake v. King*, 1 Saund. 131 b, where this is conceded; *Hare v. Miller*, 3 Leon. 138, 163. See *Proctor v. Webster*, 16 Q. B. D. 112, as to communications to the Privy Council.

329. Absolute privilege extends also to the acts and proceedings of the Executive Department, whether of the general government of the country or of the States,<sup>1</sup> or, it seems, of cities.<sup>2</sup>

Proceedings  
of the Exec-  
utive.

330. In other relations than those of the State, there is seldom any cause for absolute privilege; between man and man, outside of the affairs of State, the occasion can create only a prima facie privilege. The defendant here shows privilege as before; but now, it should be noticed, the plaintiff may in turn show (actual) malice. This head embraces a great variety of cases; only the most important of these will be presented, from which a general rule will be deduced.

Prima facie  
privilege.

331. Proceedings before church organizations, societies, clubs, and other voluntary bodies, touching the objects for which they are formed, may be mentioned first. Proceedings of such bodies, for the discipline of their members, partake somewhat of the nature of trials in the courts. Though forming no part of the general administration of justice, such proceedings, when not in conflict with the law, are sanctioned by the State. Accordingly, language used in conducting them is privileged, prima facie, so far as it is pertinent to the matter under consideration. For example: The defendant, while on trial before a church committee for alleged falsehood and dishonesty in business, says of the plaintiff, 'I discharged him for being dishonest, — for stealing. That is the cause of this trouble.' The defendant is not liable in the absence of evidence that he was actuated by express malice.<sup>3</sup>

Proceedings  
of voluntary  
societies.

<sup>1</sup> *Spalding v. Vilas*, 164 U. S. 483. See *Chatterton v. Secretary of State*, 1895, 2 Q. B. 189; ante, p. 31.

<sup>2</sup> *Trebilcock v. Anderson*, 117 Mich. 39; *Wachsmuth v. Merchants' Bank*, 96 Mich. 427.

<sup>3</sup> *York v. Pease*, 2 Gray, 282; *Farnsworth v. Storrs*, 5 Cush. 412. See *Holt v. Parsons*, 23 Texas, 9. Probably the language need not be legally relevant.

**332.** The proceedings of the courts of justice should, with some necessary exceptions, be under the eyes of the public, so that judges may sufficiently feel their responsibility.<sup>1</sup> But the whole public cannot attend the courts, and it is proper therefore that such of their proceedings as are open should be made known generally. It is accordingly laid down that the publication of proceedings had in open court, if sufficiently full to give a correct and just impression of the proceedings, and if not attended with defamatory comments, is *prima facie* privileged.<sup>2</sup> If however the same should be so incomplete or so stated as to give a wrong impression, or, though full, if it is followed by comments containing defamatory matter, the privilege would fail, and the publisher, editor, and author would be liable for any defamation thereby spread. For example: The defendant prints a short summary of the facts of a certain case in which the plaintiff has acted as attorney. The account of the trial states that the then defendant's counsel was extremely severe and amusing at the expense of the present plaintiff. It then sets out parts of the speech of the defendant's counsel which contain some severe reflections on the conduct of the plaintiff as attorney in that action. The defendant is liable.<sup>3</sup>

**333.** But it should be clearly understood that the publication of an abridged report of a trial is privileged if it is fair and accurate in substance, so as to convey a just impression of what took place, and is free from objectionable comments;<sup>4</sup> and so of the publication of proceedings in the Legislature.<sup>5</sup> It is laid down however that this privilege does not extend to the publication of papers in a cause before any proceedings have

Publication of proceedings of the courts.

Abridged reports of trials: reports from day to day.

<sup>1</sup> *Cowley v. Pulsifer*, 137 Mass. 392.

<sup>2</sup> See *Stevens v. Sampson*, 5 Ex. Div. 53, as to reports furnished by one not connected with the newspaper.

<sup>3</sup> *Flint v. Pike*, 4 B. & C. 473.

<sup>4</sup> *Turner & Sullivan*, 6 Law T. N. S. 130; *Wason v. Walter*, L. R. 4 Q. B. 73, 87.

<sup>5</sup> *Wason v. Walter*, *supra*. Contra of matters not fit for publication. *Steele v. Brannan*, L. R. 7 C. P. 261.

been taken upon them, as in the case of papers filed and published in vacation.<sup>1</sup> This would not be publishing a proceeding had in open court.<sup>2</sup> Reports from day to day, in the progress of a trial, may be published;<sup>3</sup> and the report of a judgment alone, especially if sufficient to give a just idea of the case, may be published.<sup>4</sup>

**334.** The objection to defamatory comments applies equally well when they are put into the form of a heading to the report. For example: The defendant prints an account of a trial in which the plaintiff was in-  
Comments in heading.  
 volved, heading the same ‘Shameful conduct of an attorney,’ referring to the plaintiff. The publication is not privileged.<sup>5</sup>

**335.** The editor or writer may however use a heading properly indicative of the nature of the trial, if it does not amount to comment. That is, the subject of the trial may be stated. For example: The defendant prints a report of a trial under the heading ‘Wilful and corrupt perjury.’ But this is only a statement of the charge made against the plaintiff at the trial. There is no breach of duty to the plaintiff.<sup>6</sup>

**336.** The privilege appears to extend in England, and by the better view in this country, to the publication of ex parte judicial proceedings;<sup>7</sup> it protects the publication  
Ex parte proceedings.  
 alike of preliminary and final proceedings in open court; and this though the tribunal declines to proceed for want of jurisdiction.<sup>8</sup>

<sup>1</sup> *Cowley v. Pulsifer*, 137 Mass. 392.

<sup>2</sup> *Id.* p. 394, Holmes, J.

<sup>3</sup> *Lewis v. Levy*, El. B. & E. 537; *Cowley v. Pulsifer*, 137 Mass. 392, 395.

<sup>4</sup> *Macdougall v. Knight*, 17 Q. B. Div. 636; 14 App. Cas. 194, 200. See this case again, 25 Q. B. Div. 1, denying the qualification suggested in the House of Lords, 14 App. Cas. at pp. 200, 203.

<sup>5</sup> *Lewis v. Clement*, 3 Barn. & Ald. 702.

<sup>6</sup> *Lewis v. Levy*, El. B. & E. 537.

<sup>7</sup> *Usill v. Hales*, 3 C. P. D. 319; *Metcalf v. Times Publishing Co.*, 20 R. I. 674, reviewing the cases. But see *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548; *Matthews v. Beach*, 5 Sandf. 256. See *Cowley v. Pulsifer*, 137 Mass. 392; *Belo v. Wren*, 63 Texas, 686.

<sup>8</sup> *Usill v. Hales*, *supra*; *Lewis v. Levy*, *supra*.

**337.** No privilege is conferred, apart from statute, upon the proprietors, editors, or publishers of the public prints for the publication of defamatory matter uttered in the course of public meetings though held under authority of law for public purposes. For example: The defendant prints an account of a public meeting of commissioners of a town, the body acting under powers granted by statute; and the report is a fair and truthful statement of what occurred at the meeting. It however contains defamatory language uttered concerning the plaintiff at the meeting. The defendant is liable.<sup>1</sup>

Newspaper  
reports  
containing  
defamatory  
matter.

**338.** It does not indeed make a case of privilege that a defamatory statement relates to a matter of great interest to the public, even though the public should be at a point of unusual anxiety on the subject. For example: The defendant charges the plaintiff in a newspaper with treachery and bad faith in regard to money received by him to obtain the manumission of a fugitive slave in whom there was great interest in the community. The publication is not privileged.<sup>2</sup>

Matters of  
public  
interest.

**339.** It is obviously to the advantage of the public that true accounts of the proceedings of the Legislature as well as of the courts should be placed before the people. Upon this principle therefore the publication of such proceedings by any one is privileged, though they contain defamatory matter; though the privilege of *non-official* publication, as in the other cases mentioned, will not cover malicious publications. Without evidence of malice however the protection is complete. For example: The defendant publishes a true report of a debate in Parliament, upon a petition presented by the plaintiff for the impeachment of a judge. Defamatory statements against the plaintiff are made in the course of

Any one may  
publish pro-  
ceedings of  
Legislature.

<sup>1</sup> Davison v. Duncan, 7 El. & B. 229.

<sup>2</sup> Sheckell v. Jackson, 10 Cush. 25; Cases, 178.

the debate, and these are published with the report. The defendant is not liable in the absence of malice.<sup>1</sup>

340. Communications made to the proper<sup>2</sup> public authorities, upon occasions of seeking redress for wrongs suffered or threatened, in which the public are concerned, or in which the party making or receiving the communication is alone concerned, fall within the same kind of privilege, if believed to be true by the party seeking redress, unless the communication itself or the facts connected with it show malice. For example: The defendant honestly<sup>3</sup> charges the plaintiff with being a thief, the charge being made before a constable acting as such, after the defendant had sent for him to take the plaintiff into custody. The defendant is not liable in the absence of evidence of actual malice.<sup>4</sup>

Communications asking for redress of grievances.

341. Upon the same principle honest statements at public meetings, as by a taxpayer and voter at a town meeting held to consider an application from the tax assessors of the town for the use of money for a particular purpose, may be privileged so far as they bear upon the matter before the meeting, though they be defamatory. For example: The defendant, at a town meeting held on application of the tax assessors to consider the reimbursing the assessors for expenses incurred in defending a suit for acts done in their official capacity, honestly but falsely charges the assessors with perjury in the suit. Being a taxpayer and voter, he is not liable to any of the persons defamed, unless shown to have been actuated by malice.<sup>5</sup>

Town meetings.

342. A similar protection is extended to persons acting under the management of bodies instituted by law, and

<sup>1</sup> *Wason v. Walter*, L. R. 4 Q. B. 73. The protection in this case was extended also to comments made in an honest and fair spirit.

<sup>2</sup> *Hebditch v. MacIlwaine*, 1894, 2 Q. B. 54, C. A.

<sup>3</sup> 'Honestly' and 'honest' will now be used of belief that an imputation is true.

<sup>4</sup> *Robinson v. May*, 2 Smith, 3.

<sup>5</sup> *Smith v. Higgins*, 16 Gray, 251.



having a special function of care over the interests of the public. While honestly acting within the limits of their function, they are prima facie exempt from liability for defamatory publications made. For example: The defendants, trustees of a college of pharmacy, — an institution incorporated for the purpose, among other things, of cultivating and improving pharmacy, and of making known the best methods of preparing medicines, with a view to the public welfare, — make a report to the proper officer concerning the importation of impure and adulterated drugs, falsely but honestly charging the plaintiff with having made such importations; the report being made after investigation caused by complaints made to the defendants of the importation of such drugs. The defendants are not liable unless they acted with express malice towards the plaintiff.<sup>1</sup>

**343.** The use of the public prints is sometimes justifiable to protect a person against the frauds or depredations of a private citizen; and when this is the only effectual mode of protection, persons are prima facie protected in adopting it even against innocent men. For example: The defendant, a baker, employing servants in delivering bread in various towns, inserts in a newspaper published in one of the towns a card, stating that the plaintiff ‘having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business.’ The communication is honest. It is privileged in the absence of evidence of actual malice.<sup>2</sup>

**344.** Statements made to the public in vindication of character publicly attacked are privileged, prima facie, if they are honest, if made through proper channels.<sup>3</sup> For example: The defendant publishes a newspaper

<sup>1</sup> Van Wyck v. Aspinwall, 17 N. Y. 190. See Allbut v. General Council of Medical Education, 23 Q. B. Div. 400.

<sup>2</sup> Hatch v. Lane, 105 Mass. 394.

<sup>3</sup> Laughton v. Bishop of Sodor, L. R. 4 P. C. 495.

article containing reflections upon the plaintiff's character, in reply to an article by the plaintiff assailing the defendant's character. The defendant acts honestly, in defence of himself. The communication is *prima facie* privileged.<sup>1</sup>

345. Indeed it may not affect the case that the names of other men are drawn into the controversy and tarnished. The party attacked may in reply falsely criminate others if the charges against them are honestly made, are not malicious, and are reasonably deemed necessary for self-vindication. And such reply may be made by the party's agent as well as by himself. For example: The defendant, an attorney, writes and publishes a letter in vindication of the character of one of his clients, in reply to certain charges of conspiracy preferred and published against the latter. The defendant's letter contains defamatory charges against a third person, the plaintiff. The defendant is not liable if he made the charges in reasonable and honest vindication of his client's character, and without actual malice, using terms reasonably warranted under the circumstances in which he wrote.<sup>2</sup>

346. Communications by a master, or late master, in regard to the character or conduct of his servant, made to a neighbor or other person who is apparently thinking of Master and servant. employing the servant, fall within this category of cases.<sup>3</sup> For example: The defendant, having discharged his servant the plaintiff for supposed misconduct, and hearing that he was about to be engaged by a neighbor, writes a letter to his neighbor, informing him that he has discharged the plaintiff for dishonesty, and that he cannot recommend him; the charge of dishonesty being false, but believed by

<sup>1</sup> O'Donoghue v. Hussey, Ir. R. 5 C. L. 124, Ex. Ch.

<sup>2</sup> See Regina v. Veley, 4 Fost. & F. 1117; Seaman v. Netherclift, 2 C. P. Div. 53, ante, p. 166; Wason v. Walter, L. R. 4 Q. B. 73, ante, p. 173. These three cases taken properly together justify the example, the facts in which vary from Regina v. Veley, in making the imputation relate to a third person.

<sup>3</sup> Billings v. Fairbanks, 139 Mass. 66; Hollenbeck v. Ristine, 105 Iowa, 488; Pattison v. Jones, 8 B. & C. 578.

the defendant to be true. The defendant has a *prima facie* right to make the statement.<sup>1</sup>

**347.** The same is true where there exists a very near relationship, or a pecuniary connection of confidence, between the parties; as in the case of a parent admonishing his daughter against the attentions of a particular person, who is falsely charged with the commission of a crime; or of a partner advising his copartner to have no partnership dealing with another, on the false ground, e. g., that he is a thief.

**348.** A confidential relation by pecuniary connection is, for the purposes of this protection, much wider than might be supposed from the case of partners last mentioned. A confidential relation, within the scope of the protection to voluntary communications, (probably) arises wherever a continuous or temporary trust is reposed in the skill or integrity of another, or the property or pecuniary interest, in whole or in part, or the bodily custody, of one person, is placed in charge of another.<sup>2</sup> Besides the cases above stated, this definition will cover communications made by an attorney to his client concerning third persons with whom the client is, or is about to be, engaged in business transactions;<sup>3</sup> communications made to an auctioneer of property concerning the sale by persons interested in the property;<sup>4</sup> communications of landlords to their tenants imputing immoral conduct to some of the inmates of the premises;<sup>5</sup> and many other cases of a like nature.

**349.** In most of the foregoing cases, it will be noticed, the communication was volunteered, and this of necessity; if made at all, it must have been volunteered. That fact accordingly has no bearing upon the question of liability. Indeed the most that can be said of

**Voluntary  
communication.**

<sup>1</sup> *Pattison v. Jones*, *supra*.

<sup>2</sup> See *Bigelow*, *Fraud*, i. 262.

<sup>3</sup> See *Davis v. Reeves*, 5 Ir. C. L. 79.

<sup>4</sup> *Blackham v. Pugh*, 2 C. B. 611.

<sup>5</sup> *Knight v. Gibbs*, 3 Nev. & M. 467.

the fact that a communication was volunteered, in a case of privilege, is that it may sometimes be taken, along with other facts, as evidence of malice.<sup>1</sup> Alone however it would probably have no significance.

350. On the other hand, a communication is not necessarily privileged because of being made upon request, though very often it is privileged. If it should be unnecessarily defamatory under the circumstances, Communication on request. the privilege would be lost. Such fact would indeed show that the writer or speaker was actuated by malice, and would thus destroy the protection which may have been available to the party, and restore to the plaintiff his right of redress.<sup>2</sup>

351. Again, a communication made upon request is not protected unless the request come from a proper person, or at least from one whom the defendant has reason to suppose a proper person. If the defendant know, or have good reason to know, that the party making the inquiry has no interest in the matter in question other than that of curiosity, the defendant manifestly is not justified in making the communication. Even the near relatives of a person interested in the subject of the communication cannot by request afford protection to every one to publish defamation of another. For example: The defendant, formerly but not at present pastor of a lady, writes a letter to the lady, on request of her parents, warning her against receiving attention from a certain person, the letter containing false and defamatory accusations against him. The communication is not privileged.<sup>3</sup>

352. Apart from cases of self-vindication,<sup>4</sup> the subject of *prima facie* privilege may be summed up by the following

<sup>1</sup> See *Pattison v. Jones*, 8 B. & C. 578, 584, Bayley, J.

<sup>2</sup> *Fryer v. Kinnersley*, 15 C. B. N. S. 422.

<sup>3</sup> *Joannes v. Bennett*, 5 Allen, 169. Perhaps the communication would have been privileged had it come from the lady's present pastor; and it clearly would have been protected had it been written on request of the lady herself.

<sup>4</sup> In a case of self-vindication, the public, before which the accused seeks to vindicate himself, may have no duty or interest in the matter.

general proposition: A communication believed to be true, and made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a legal or moral duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which, without such privilege, would be actionable.<sup>1</sup>

**353.** Prima facie privilege accordingly rests upon duty or interest. It is then a matter of motive; to make the occasion (prima facie) privileged, one must have been led — moved — by duty or interest. That is the test to which every case of the kind should be brought; if the motive of the defendant was not duty or interest, — if for instance it was malice, — there is no ground for the privilege. To put the case in another way, if the defendant bring forward facts which show the existence of duty or interest, the question still is, whether that was in fact the motive which governed his conduct in the publication in question.

**354.** No more however is required of the defendant than evidence that he was acting from duty or interest; it is not necessary for him to go further and prove that he believed what he said to be true.<sup>2</sup> *That* will be presumed until the plaintiff shows the contrary, or proves malice, or other facts inconsistent with the alleged privilege. Indeed where the defendant is simply making report to a superior of what his duty requires him to report, such as an accusation made by another against the plaintiff, it cannot be material whether the defendant believes the accusation true or not. Enough that in good faith he reports it, as required, to his superior.<sup>3</sup> But apart from such

<sup>1</sup> *Harrison v. Bush*, 5 El. & B. 344; *Gassett v. Gilbert*, 6 Gray, 94; *Joannes v. Bennett*, 5 Allen, 169; *Sullivan v. Stratham Co.*, 152 Mo. 268.

<sup>2</sup> *Jenoure v. Delmege*, 1891, A. C. 73, Privy Council. But see *Toothaker v. Conant*, 91 Maine, 438; *McNelly v. Burleigh*, id. 22. See also *Hellstern v. Katzer*, 103 Wis. 391.

<sup>3</sup> *Jenoure v. Delmege*, *supra*.

cases, — if the defendant himself makes the accusation, — his belief in the truth of the accusation is relevant. He will indeed be presumed to believe it, but if the plaintiff shows that he does not, or otherwise proves malice, or any other fact inconsistent with the supposed privilege, the plaintiff will be entitled to recover.<sup>1</sup>

**355.** The motive of interest or duty must, as the foregoing implies, be single; a mixed motive, of interest or duty and malice (or other fact), would be fatal to the plaintiff.<sup>2</sup> It is always laid down to be sufficient for the plaintiff to prove that the defendant acted maliciously. As for duty, that may be moral as well as legal; as for interest, that must, it seems, consist in legal right or in something of the nature of legal right.<sup>3</sup> The duty or interest however must, it seems, be real; it is not enough that the defendant supposed he had a duty or an interest, if he had not.<sup>4</sup>

**356.** We have here the noticeable fact that malice as a motive has a true place in the law,<sup>5</sup> though a secondary one,

<sup>1</sup> *Jenoure v. Delmege*, 1891, A. C. 73; *Pattison v. Jones*, 8 B. & C. 578; *Dawkins v. Paulet*, L. R. 5 Q. B. 94, 102; *Clark v. Molyneux*, 3 Q. B. Div. 237. See *Clark v. Thompson*, 90 Maine, 298; *O'Rourke v. Sun Publishing Co.*, 89 Maine, 310.

<sup>2</sup> Such is the effect of *Jenoure v. Delmege*, supra. But qu. whether a person should lose his privilege when reporting a defamatory charge which he was *legally bound* to report, because he does not believe the charge to be true or otherwise performs his duty maliciously?

<sup>3</sup> Ante, p. 11.

<sup>4</sup> *Hebditch v. MacIlwaine*, 1894, 2 Q. B. 54, C. A. But see *Jenoure v. Delmege*, 1891, A. C. 73, where the Privy Council took it for granted that belief was enough; perhaps confusing privilege itself with the subject-matter of the privilege.

<sup>5</sup> We have seen that privilege in one form or another is a general principle of law (ante, pp. 8–11, 19–21, and note); accordingly malice, in the sense of a motive, is in sound theory available generally, and not merely in slander and libel, to overturn the allegation or the presumption of privilege. See ante, pp. 19–21. Where a man justifies by a motive, as duty or interest, it may certainly be shown that he was not governed by that but by another motive.



—not in making a *prima facie* cause of action.<sup>1</sup> Indeed it is laid down that the malice required, when the question of privilege turns on malice, is malice in that very sense, — the popular idea of malice, as an evil motive.<sup>2</sup> Accordingly, external manifestation, such as the common case of excessive zeal, is to be considered as *evidence* of a malicious motive, and not necessarily as malice absolute; the effect of it being capable of being taken away by evidence consistent with zeal but inconsistent with malice.

**357.** It follows from what has been said, that no privilege is afforded the mere repetition of defamation; and this is true by the weight of authority, though the party repeating it give the name of the person from whom he received it. The repetition of the language is generally deemed actionable to the same extent, and doubtless with the same qualifications, as is the original publication.<sup>3</sup> For example: The defendant says to a third person concerning the plaintiff, ‘You have heard of the rumor of his failure,’ — merely repeating a current rumor that had come to his ears that the plaintiff had failed. The defendant is liable if there was no such relation between him and the party to whom he made the communication as would cause the latter to expect a communication on such matters.<sup>4</sup>

## § 11. OF CRITICISM.

**358.** Criticism cannot be defamation, unless it strikes at personal character. It is protected therefore, not because it

<sup>1</sup> Ante, pp. 18–21.

<sup>2</sup> *Nevill v. Fine Arts Ins. Co.*, 1895, 2 Q. B. 156, 169, Lord Esher.

<sup>3</sup> *De Crespigny v. Wellesley*, 5 Bing. 392; s. c. L. C. Torts, 151; *Folwell v. Providence Journal Co.*, 19 R. I. 551; *Stevens v. Hartwell*, 11 Met. 542; *Sans v. Joeris*, 14 Wis. 663; *Inman v. Foster*, 8 Wend. 602. Contra, *Haynes v. Leland*, 29 Maine, 233. See also *Jarnigan v. Fleming*, 43 Miss. 710; *Northampton's Case*, 12 Coke, 134.

<sup>4</sup> *Watkin v. Hall*, L. R. 3 Q. B. 396.

is privileged, but because it is not defamation,<sup>1</sup> or rather because it is not wrongful. This broader ground is certainly the true one; speaking in technical but significant language, it is not necessary to ‘justify’ criticism. However severe it may be, however unjust in the opinion of men capable of judging, so long, in England at least, as the critic confines himself to what is there called ‘fair criticism’ of another’s works, the act cannot be treated as a breach of duty. But if the critic turn aside from the proper purpose of criticism, and hold up one’s character to ridicule, he becomes liable.<sup>2</sup>

Distinguished  
from defama-  
tion.

**359.** The criticism of works of art, whether painting, sculpture, monument, or architecture, falls of course within the rule. For example: The defendant says of a picture of the plaintiff, placed on exhibition, ‘It is a mere daub.’ The defendant, if fair in his criticism,<sup>3</sup> cannot be held liable to an action for defamation, however unjust the criticism.<sup>4</sup>

**360.** The conduct too of public men amenable to the public only, and of candidates for public office, is a matter proper

<sup>1</sup> *Merivale v. Carson*, 20 Q. B. Div. 275; *Campbell v. Spottiswood*, 3 Best & S. 769, 780. This overrules *Henwood v. Harrison*, L. R. 7 C. P. 606, 626, where, as by some of our courts, criticism is treated as privileged. Criticism is privileged only in the improper sense that the act in itself is lawful, not that it is made upon an occasion which protects it. Football, every lawful act, resulting in harm, is ‘privileged’ in the same way.

<sup>2</sup> *Id.*; *Carr v. Hood*, 1 Campb. 355, note; *Strauss v. Francis*, 4 Fost. & F. 939 and 1107. See s. c. L. R. 1 Q. B. 379.

<sup>3</sup> See *Merivale v. Carson*, 20 Q. B. Div. 275, 280, 283, as to ‘fair criticism.’ In England the question is directly put to the jury whether the criticism is ‘fair;’ which is stated to mean whether, in their opinion, the criticism goes beyond what any fair man, however prejudiced or strong his opinion may be, might express. *Merivale v. Carson*, at p. 280. See also *id.* at p. 283. Cases, 144, 148, 149.

<sup>4</sup> *Thompson v. Shackell*, Moody & M. 187. See *Whistler v. Ruskin*, London Times, Nov. 26, 27, 1878 (*unfair* criticism); *Merivale v. Carson*, *supra*; *Gott v. Pulsifer*, 122 Mass. 235. The recent case of *Dooling v. Budget Pub. Co.*, 144 Mass. 258, turned upon a distinction between criticism of the plaintiff in his business of caterer and slander of title. The distinction is, that if the comment, being upon property, is true it is criticism, if false it is slander of title.

for public discussion. It may be made the subject of hostile criticism and animadversion, so long as the writer keeps within the bounds of an honest intention to discharge a duty to the public, and does not make the occasion a mere cover for promulgating false and defamatory allegations. The question in such cases therefore is, whether the author of the statements complained of has transgressed the bounds within which comments upon the character or conduct of a public man should be confined; — whether, instead of fair comment, the occasion was made an opportunity for gratifying personal vindictiveness and hostility,<sup>1</sup> as by making false charges of disgraceful acts.<sup>2</sup> In a word, fair criticism or comment upon the real acts of a public man is one thing; it is ‘quite another to assert that he has been guilty of particular acts of misconduct.’<sup>3</sup> Criticism of public men should be limited to matters touching their qualifications for the performance of the duties pertaining to the position which they hold or seek.<sup>4</sup>

**361.** If however an officer, or an office sought, be not subject to direct control by the public, — if the same be subordinate to the authority of some one having power of removal over the incumbent, — then (probably) there exists no right to animadvert upon the conduct of such subordinate officer or candidate through public channels. For in such a case the question appears to be one of capacity or of fitness for a par-

**Officers not subject directly to public control.**

<sup>1</sup> *Campbell v. Spottiswoode*, 3 Best & S. 769, 776; *Merivale v. Carson*, 20 Q. B. Div. 275, 283.

<sup>2</sup> *Davis v. Shepstone*, 11 App. Cas. 187.

<sup>3</sup> *Id.* at p. 190; *Austin v. Hyndman*, 119 Mich. 615; *Wilcox v. Moore*, 69 Minn. 49; *Martin v. Paine*, *id.* 482; *Wallace v. Jameson*, 179 Penn. St. 98.

<sup>4</sup> Our courts differ however, or appear to differ, as to how far criticism of public men may go. See on the one hand *Hamilton v. Eno*, 81 N. Y. 116; *Root v. King*, 7 Cowen, 613; s. c. 4 Wend. 113; *Sweeney v. Baker*, 13 W. Va. 158; *Curtis v. Mussey*, 6 Gray, 261. On the other hand see *Palmer v. Concord*, 48 N. H. 211; *Mott v. Dawson*, 46 Iowa, 533. See also *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251. But there would probably be no dispute about the proposition of the text.

ticular position. Though engaged in business of the public, the officer is not a 'public man' but a servant. The proper course to pursue in case of supposed incapacity or unfitness of the party for the position would be to state the case to the superior officer alone, and call upon him to act accordingly.<sup>1</sup>

362. It must be understood that the law of slander and libel applies only to defamation in pais; that is, to defamatory charges not prosecuted in a court of justice. If the defamation consist of an accusation prosecuted in court, the accused must seek his redress by an action for a malicious prosecution, in regard to which the right to recover depends, as has been seen, upon quite different rules of law.<sup>2</sup>

<sup>1</sup> Compare Odgers, 223, 224.

<sup>2</sup> See chapter iii.

## CHAPTER VIII.

### ASSAULT AND BATTERY.

*Statement of the duty.* A owes to B the duty not (1) to attempt with force to do hurt to his person, within reach; or (2) to hit or touch him intentionally, or recklessly as in rudeness, or in the commission of any trespass or crime.

There is so much in common in the law of the two wrongs of assault and battery, and the two are so often coincident, that the terms are frequently used without discrimination. 'Assault' is constantly used in the books of cases of contact, making it include 'battery.'<sup>1</sup> But assault without contact is a wrong equally with battery; and it will be convenient and advisable to consider the two subjects separately, however similar the law in regard to them.

#### § 1. OF ASSAULT (WITHOUT CONTACT): WHAT MUST BE PROVED, ETC.

**363.** An assault (without contact) is an attempt, real or apparent, to do hurt to another's person, within reach. It is an *attempt* to do bodily harm, stopping short of actual execution.<sup>2</sup> To prove such an attempt entitles the plaintiff, presumptively, to recover. If the attempt be carried out by physical contact, the act becomes a battery; but the act is equally unlawful and actionable when it stops with a mere attempt to inflict hurt. It is not alone a blow that, because of unpermitted contact with the person, is unlawful. The sensibility to danger may be in-

<sup>1</sup> See the proposed definition in the English draft Criminal Code of 1879: Pollock, Torts, 192, 2d ed.

<sup>2</sup> Words are no assault; but they may be a menace and so actionable, with proof of damage. L. C. Torts, 225-227.

tentionally shocked; and feelings so affected are within the protection of the law quite as much as the feeling produced by blows. It is actionable for A to shake his fist in the face of B.<sup>1</sup>

364. In ordinary cases of assault, the question whether the defendant *actually* intended to do the bodily harm cannot, as the definition implies, enter into the case.<sup>2</sup> If reasonable fear of present bodily harm has been caused by the threatening attitude, the effect of an assault has been produced; and not even a disclaimer by the wrongdoer coincident with his act could, it seems, prevent liability. One may well complain of a man who points a pistol at one, though the man truly declare that he does not intend to shoot;<sup>3</sup> for the ordinary effect of an assault, the intended putting one in *fear*, is produced.<sup>4</sup>

365. But it may appear in a particular case that an expressed purpose, or want of purpose, is a determining fact in solving a doubt; that is, it may be such a part of the act in question as to turn the scales in deciding whether an assault has been committed. A denial of present purpose to do

<sup>1</sup> Bacon's Abr. 'Assault and Battery,' A.

<sup>2</sup> But an assault cannot, it seems, be committed by negligence, so as to be actionable without proof of special damage. Compare *Spade v. Lynn R. Co.*, 168 Mass. 285, 290; s. c. 172 Mass. 488. Note the difference accordingly between intended harm by attempt, and harm due to negligence. The former would instinctively call for physical redress; hence it is actionable *per se*. Ante, pp. 27, 28.

<sup>3</sup> See *Reg. v. St. George*, 9 Car. & P. 483, 493, Parke, B.; Bacon's Abr. 'Assault and Battery,' A; 1 Hawkins, P. C. 110; Pollock, Torts, 193, 2d ed., doubting *Blake v. Barnard*, 9 Car. & P. 626, 628, and *Reg. v. James*, 1 C. & K. 530. *Reg. v. St. George*, ut supra, 'would almost certainly be followed at this day.' Pollock, Torts, 193, note, 2d ed. But see *Reg. v. Duckworth*, 1892, 2 Q. B. 83.

<sup>4</sup> It may not be necessary however to an assault that this effect should be produced. A person assaulted may be entirely fearless, feeling sure that the blow will not fall. Again, one may probably be assaulted in the dark without knowing it. But the putting in fear is the ordinary effect, and what *might* well put in fear is probably a test. Intent to *harm* is unnecessary; intent to put in *fear* is necessary.



harm, or any language indicating a want of such purpose, may serve, under the circumstances, to prevent the excitement of any reasonable fear of present bodily harm. If then it appear that the supposed wrong was committed in such a manner that the plaintiff must have known that no present violence was intended, the act is not an assault. For example: The defendant, on drill as a soldier, putting his hand upon his sword, says to the plaintiff, 'If it was not drill-time, I would not take such language from you.' This is not an assault, since the language used, under the circumstances, shows that there was no attempt, real or apparent, to do violence.<sup>1</sup>

**366.** If however the plaintiff has reason to believe, from the defendant's hostile attitude, that harm was intended, there is an assault, whether the defendant did or did not intend *harm*. So at least it is held for the purpose of civil redress. For example: The defendant in an angry manner points an unloaded gun at the plaintiff, and snaps it, with the apparent purpose of shooting. The gun is known by the defendant to be unloaded; but the plaintiff does not know the fact, and has no reason to suppose that it is not loaded. The defendant is liable for an assault, though he could not have intended to shoot the plaintiff.<sup>2</sup>

**367.** The parties must generally have been within reach of each other, not necessarily within arm's reach, for an assault may be committed (as already appears) by means of a weapon or missile; and in such a case it is only necessary that the plaintiff should have been within reach of the projectile.<sup>3</sup> And even when the alleged assault is committed with the fist, it is not necessary that the plaintiff should have been within arm's reach of the defendant, provided the defendant was advancing to strike the plaintiff, and was restrained by others from carrying out his purpose when almost within reach of the plaintiff.

Parties must  
be within  
reach of each  
other: excep-  
tions.

<sup>1</sup> See *Tuberville v. Savage*, 1 Mod. 3.

<sup>2</sup> *Beach v. Hancock*, 27 N. H. 223.

<sup>3</sup> *Tarver v. State*, 43 Ala. 354; *State v. Taylor*, 20 Kans. 643.

For example: The defendant advances toward the plaintiff in an angry manner, with clenched fist, saying that he will pull the plaintiff out of his chair, but is arrested by a person sitting next to the plaintiff between him and the defendant. The act is an assault, though the defendant was not near enough to strike the plaintiff.<sup>1</sup>

368. In like manner, if the defendant should cause the plaintiff to flee in order to escape violence, he may be guilty of an assault, though he was at no time within reach of the plaintiff; it is enough that flight or concealment becomes necessary to escape the threatened evil. For example: The defendant on horseback rides at a quick pace after the plaintiff, then walking along a foot-path. The plaintiff runs away, and escapes into a garden; at the gate of which the defendant stops on his horse, shaking his whip at the plaintiff, now beyond danger. This is an assault.<sup>2</sup>

369. It will be observed, from the statement of the duty which governs this branch of the law, that a mere assault is a civil offence; and hence the person assaulted has a right of action, though he may not have suffered any loss or detriment from the offence. In such a case however, unless the assault was outrageous, he could (probably) recover only nominal damages.<sup>3</sup>

## § 2. OF BATTERIES: WHAT MUST BE PROVED, ETC.

370. A battery consists in the unpermitted application of force by one man to the person of another. Proof of such fact is enough to make a *prima facie* case. A battery therefore is mainly distinguishable from an assault in the fact that physical contact is necessary to accomplish it. But, as the definition indicates, this contact need not be effected by a blow; any forcible contact may be sufficient. For example: The defendant, an overseer of the

Damage not  
necessary.

Definition.

<sup>1</sup> *Stephens v. Myers*, 4 Car. & P. 349; s. c. L. C. Torts, 217.

<sup>2</sup> *Martin v. Shoppee*, 3 Car. & P. 373.

<sup>3</sup> The damages recovered in *Stephens v. Myers*, *supra*, were one shilling.

poor, cuts off the hair of the plaintiff, an inmate in the poor-house, contrary to the plaintiff's will, and without authority of law. This is a battery, and the defendant is liable in damages.<sup>1</sup> Again: The defendant, in passing through a crowded hall, pushes his way in a rude manner against the plaintiff. This is also a battery.<sup>2</sup>

**371.** It is not necessary that the defendant should come in contact with the plaintiff's body. It is sufficient if the blow or touch come upon the plaintiff's clothing. For example: The defendant, in anger or rudeness, knocks off the plaintiff's hat. This is enough to constitute a battery.<sup>3</sup>

**372.** Indeed it is not necessary that the plaintiff's body or clothing be touched. To knock a thing out of the plaintiff's hands, such as a staff or cane, would clearly be a battery; and the same would be true of the striking a thing upon which he is resting for support, at least if this cause to the plaintiff a fall or concussion. For example: The defendant strikes or kicks a horse upon which the plaintiff is riding, or a horse hitched to a wagon in which the plaintiff is riding. This is a battery.<sup>4</sup> Again: The defendant drives a vehicle against the plaintiff's carriage, throwing the plaintiff from his seat. This also is a battery.<sup>5</sup> Again: The defendant runs against and overturns a chair in which the plaintiff is sitting. This too is a battery.<sup>6</sup>

**373.** It appears from the foregoing examples that it is not necessary to constitute a battery that the touch or blow or

<sup>1</sup> *Forde v. Skinner*, 4 Car. & P. 239.

<sup>2</sup> *Cole v. Turner*, 6 Mod. 149; s. c. L. C. Torts, 218.

<sup>3</sup> Mr. Addison gives this as an example of a battery, without citing authority; but there can be no doubt of its correctness. Addison, Torts, 571 (4th ed.).

<sup>4</sup> *Clark v. Downing*, 55 Vt. 259; *Dodwell v. Burford*, 1 Mod. 24. Probably it would not be necessary that the plaintiff should be thrown from the horse or thrown against anything.

<sup>5</sup> *Hopper v. Reeve*, 7 Taunt. 698.

<sup>6</sup> *Id.* It was held immaterial in this case whether the chair or carriage belonged to the plaintiff or not.

other contact should come directly from the defendant's person. Indeed a battery may be committed at any distance between the parties if only some violence be done to the plaintiff's person. The hitting one with a stone or other missile is no less a battery than the striking one with the fist. It is not necessary even that the object cast should do physical harm; the battery consists in the unpermitted contact, not in the damage. For example: The defendant spits or throws water upon the plaintiff. This is a battery, though no harm be done.<sup>1</sup>

374. In earlier times it appears to have been considered that a battery might be committed merely by negligence. For example: The defendant, a soldier, handles his arms so carelessly in drilling as to hit the plaintiff with them. This is deemed a battery, though the act was not intended.<sup>2</sup> The above-mentioned case of the running into the plaintiff's carriage might be another example.<sup>3</sup> But there is reason to doubt whether cases short of actual or virtual intention, or recklessness, would now be actionable without proof of damage.

Battery from  
a distance.

Whether neg-  
ligence can  
constitute a  
battery.

375. But a person may be guilty of a battery where his act is directly caused by another person, provided the defendant was at the time committing a crime or a trespass. For example: The defendant, when about to discharge a gun unlawfully at a third person, is

Plaintiff not  
the person in-  
tended.

<sup>1</sup> See *Regina v. Cotesworth*, 6 Mod. 172; *Pursell v. Horn*, 8 Ad. & E. 602. A word of explanation is necessary as to the latter case. The plaintiff had sued for a battery by throwing of water on him, and had failed to prove it, though he proved certain consequential injuries, and had a verdict for below forty shillings. The damages not reaching forty shillings, and a battery not having been proved, the plaintiff was not entitled (under the statute) to the costs given him. He now attempted to show that he had not sued for a battery at all, or, if he had, that a battery had been admitted by the defendant's plea; which, if true, would save him his costs as given by the jury. But the court decided against him, and cut down the costs allowed; thus holding that to throw water upon a person is a battery.

<sup>2</sup> *Weaver v. Ward*, Hob. 134. See *Holmes v. Mather*, L. R. 10 Ex. 261.

<sup>3</sup> See also *Hall v. Fearnley*, 3 Q. B. 919.

jostled just as the gun is fired, and the direction of the shot is changed so as to cause the plaintiff to be hit. This is a battery.<sup>1</sup>

376. Indeed in former times every blow which *resulted* from an intended act seems to have been looked upon as a battery,<sup>2</sup> in accordance with the general primitive idea, that if a man suffered harm at the hands of another, the latter must justify if he could. The modern authorities strongly tend to a different view. There is no *battery*, according to the modern view, unless the blow itself was intentional or reckless, or unless the defendant was otherwise conducting himself as a trespasser at the time.<sup>3</sup> No man when doing that which is right-ful should be held liable for consequences which he could not prevent by prudence or care, though another suffer bodily or other harm thereby. Such is the modern theory of civil liability.<sup>4</sup> For example: The defendant's horse, upon which the defendant is lawfully riding in the highway, takes a sudden fright, runs away with his rider, and against all the efforts of the defendant to restrain him, runs against and hurts the plaintiff. This is not a battery or other breach of duty.<sup>5</sup> Again: The defendant, walking near the plaintiff, suddenly turns round, and in so doing hits the plaintiff with his elbow. This is not a battery.<sup>6</sup>

<sup>1</sup> See *James v. Campbell*, 5 Car. & P. 372, where the defendant, in fighting with another, hit the plaintiff with his fist.

<sup>2</sup> See Year Book, 21 Hen. 7, 28; *Lambert v. Bussey*, T. Raym. 421; *Weaver v. Ward*, *supra*.

<sup>3</sup> *Coward v. Baddeley*, 4 H. & N. 478, Martin, B., *infra*; *Holmes v. Mather*, L. R. 10 Ex. 261; *Wakeman v. Robinson*, 1 Bing. 213; *Hall v. Fearnley*, 3 Q. B. 919; *Brown v. Kendall*, 6 Cush. 292; *Cases*, 191; *Vincent v. Stinehour*, 7 Vt. 62; *Nitroglycerine Case*, 15 Wall. 524. See *Spade v. Lynn R. Co.*, 172 Mass. 488; s. c. 168 Mass. 285. See also *Pollock, Torts*, 122 et seq., 2d ed. The old cases have fairly ceased to be law, both in England and in America.

<sup>4</sup> *Stanley v. Powell*, 1891, 1 Q. B. 86; post, p. 328.

<sup>5</sup> See *Vincent v. Stinehour*, 7 Vt. 62, and example cited by Williams, C. J.; and see *Holmes v. Mather*, *supra*, a still stronger case.

<sup>6</sup> A case put by Martin, B., on the argument in *Coward v. Baddeley*, 4 H. & N. 478. See *Brown v. Kendall*, 6 Cush. 292; *Cases*, 191; *Holmes v. Mather*, *supra*; *Stanley v. Powell*, *supra*; *Holmes*, *Common Law*, 105, 106.



377. Nor is there necessarily a right of action though (not merely the general action of the defendant, as in the last example, but) the specific act of contact be intentional, for it may have been done in sport or play; though sport could doubtless be carried to such an extreme as to create liability. It is not even a decisive test, always, to inquire whether the act was done against the plaintiff's will. The plaintiff may be engaged in criminal conduct at the time; or he may be lying, unconsciously, in an exposed condition; or with the best of intentions he may be doing that which the defendant rightly thinks dangerous to life or property. In the first of these cases, an arrest of the plaintiff by laying on of hands will be justifiable; in the second case, an arousing or removing of him will be proper; in the third, the laying on of hands to attract his attention is lawful.<sup>1</sup> In none of these cases is there liability, though the contact be against the will of the plaintiff.<sup>2</sup> If however the act were done in a *hostile* manner, the case would be different.<sup>3</sup>

Blow in play:  
other justifiable cases.

378. A battery may be committed in an endeavor to take one's own property from the wrongful possession of another. If the party in possession should refuse to give up the property, the owner should resort to the courts to obtain it, or await an opportunity to get possession of it in a peaceful manner. He has no right to take it out of the hands of the possessor by force. For example: The defendant, finding the plaintiff in wrongful possession of the former's horse, beats the plaintiff, after a demand and refusal to give up the animal, and wrests the horse from the plaintiff's possession. This is a battery.<sup>4</sup>

Taking one's  
own property  
from another.

<sup>1</sup> As to the last case, see *Coward v. Baddeley*, *supra*.

<sup>2</sup> These however are properly cases of justification; the justification accompanies what otherwise would be actionable.

<sup>3</sup> *Coward v. Baddeley*, *supra*.

<sup>4</sup> *Andre v. Johnson*, 6 Blackf. 375. See *Suggs v. Anderson*, 12 Ga. 461. But the defendant could keep his horse. *Scribner v. Beach*, 4 Denio, 448, 451.



### § 3. OF JUSTIFIABLE ASSAULT: SELF-DEFENCE: 'SON ASSAULT DEMESNE.'

**379.** There are a few cases in which a man is entitled to take the law into his own hands and inflict corporal injury upon another. Among these are to be noticed **Administer-** the right of a parent to give moderate correction **ing correc-** to his minor child; the (probable) right of a **tion.** guardian to do the like to a minor ward placed in his family; the right of a schoolmaster (when not prohibited by law or school ordinance) to do the like to his scholars;<sup>1</sup> the (possible) right of a master to do the like to young servants; and the right of officers of reform, discipline, or correction to do the like towards the refractory who have been committed to their charge.

**380.** Aside from these and similar cases, the right to do that which would otherwise amount to an assault or a battery is confined to two or three cases, all of which are **Self-defence.** justified on grounds either of self-defence or on the ground that the plaintiff really caused the act of which he complains. In the language of the old law the wrong complained of by the plaintiff was 'son assault demesne.' A person cannot be liable for an act which he himself has not committed or caused, either personally or by another authorized to act for him. Hence if the plaintiff himself caused the act complained of, the defendant cannot be liable to him for it.

**381.** The chief case to be noticed in which the justification of 'son assault demesne' is allowed is self-defence. Where **Protection of** ever it has become apparently necessary to the **property.** defendant's protection to repel force by force, he may do so.<sup>2</sup> The right of self-defence extends to the use of

<sup>1</sup> See *Sheehan v. Sturges*, 53 Conn. 481; *Hathaway v. Rice*, 19 Vt. 102; *Commonwealth v. Randall*, 4 Gray, 36; *Cooper v. McJunkin*, 4 Ind. 290; *Fertich v. Michener*, 111 Ind. 472.

<sup>2</sup> *Drew v. Comstock*, 57 Mich. 176; *Miller v. State*, 74 Ind. 1. The difficulty is in determining when it is apparently necessary to do the thing complained of, and when one may strike or shoot without first 'retreat-

physical force in the protection of property as well as of the person of the defendant, provided the property be at the time in the defendant's possession. No one has a right, except under authority of law, to seize upon the property of which the owner is in possession; to do so is to take the risk of bodily violence. For example: The plaintiff, a creditor of the defendant, seizes the defendant's horses (which the latter is using) for the purpose of obtaining satisfaction of his debt. The defendant resists and strikes the plaintiff. He is not liable if he did not exceed the bounds of defence.<sup>1</sup>

**382.** If the owner or person entitled to possession was out of possession at the time of committing the alleged assault or battery, he will not be permitted to say, by way of defence, that the plaintiff caused the assault by having previously taken wrongful possession, or by having wrongfully detained the defendant's property. Such is not a case of son assault demesne, as the example already given of the horse taken from the plaintiff's possession by violence shows.<sup>2</sup>

**383.** And though a trespasser should make an assault upon the owner of property, and seek to take it out of the owner's possession, the owner is allowed to use no greater force in resisting the unlawful act than may be necessary for the defence of his possession.<sup>3</sup> If he should reply to the trespasser's attempt with a force out of proportion to the provocation, the act would then be his own battery, and not the plaintiff's; or again, in the technical language of the old pleading, the plaintiff can then reply to the defendant's plea of son assault demesne, that the tort was 'de injuria sua

ing to the wall.' See *Howland v. Day*, 56 Vt. 318; *Haynes v. State*, 17 Ga. 465; *State v. Dixon*, 75 N. C. 275; *Cooley*, Torts, 190, 2d ed. Retreat cannot be required where action upon the instant appears to be necessary for self-protection. See *Beard v. United States*, 158 U. S. 550; *Page v. State*, 40 N. E. Rep. 745 (Ind.).

<sup>1</sup> See *Cluff v. Mutual Ben. Life Ins. Co.*, 13 Allen, 308; s. c. 99 Mass. 317; *Scribner v. Beach*, 4 Denio, 448.

<sup>2</sup> Ante, p. 191.

<sup>3</sup> The allowable force in such a case is expressed by the words of the old pleading, 'molliter manus imposuit,' — the defendant gently laid his hands upon the plaintiff.

propria,' — the defendant's own wrong. For example: The defendant, owner of a rake which is in his own hands, knocks the plaintiff down with his fist, upon the plaintiff's taking hold of the rake to get possession of it. The defendant is liable.<sup>1</sup> Again: The defendant strikes the plaintiff repeated blows, knocking her down several times, upon her refusal to quit the defendant's house. The plaintiff is entitled to recover.<sup>2</sup>

384. Nor is it lawful for the owner of property, in defence of his possession, to make an attack upon the trespasser without first calling upon him to desist from his unlawful purpose, unless the trespasser is at the time exercising violence. In the example last given, the defendant would have been liable for a mere hostile touch had he not first requested the plaintiff to leave his premises; unless she had entered his premises forcibly.<sup>3</sup>

385. In the next place it is to be observed that a person may not only make reasonable defence of his own person, and of the possession of his own property; he may do the same towards the members of his own family when attacked,<sup>4</sup> and perhaps also towards the inmates of a house in which he is then receiving hospitality. Certain it is that a servant may justify a battery as committed in defence of his master;<sup>5</sup> that is, he may do anything in his master's defence which his master himself might do. And on the other hand, notwithstanding some doubts in the books, a master may justify a battery as committed in defence of his servant. For example: The plaintiff attacks the defendant's servant, whereupon the defendant assists his servant to the extent of repelling the attack, and no further. The defendant is not liable.<sup>6</sup>

Reasonable  
defence of  
members of  
one's family.

<sup>1</sup> *Scribner v. Beach*, 4 Denio, 448.

<sup>2</sup> *Gregory v. Hill*, 8 T. R. 299.

<sup>3</sup> See *Scribner v. Beach*, 4 Denio, 448.

<sup>4</sup> *Black. Com.* i. 429.

<sup>5</sup> *Reeve*, *Domestic Rel.* 538 (3d ed.).

<sup>6</sup> *Tickell v. Read*, *Lofft*, 215.

**386.** A person may also justify the use of a proper amount of physical force as rendered in quelling a riot or an affray at the instance of a constable or other officer of the peace,<sup>1</sup> or perhaps of his own motion when no officer is present. Quelling riot.

#### § 4. OF VIOLENCE TO OR TOWARDS ONE'S SERVANTS.

**387.** It will have been observed that a double breach of duty may be committed by the same assault or battery; one to the person to whom the violence is done, and, where such person is a servant or a child of the plaintiff, another breach to the person whom he or she was serving or assisting. It follows that each has a right of action against the wrongdoer in respect of the breach of his own individual right; the servant or child for the violence (that is, for the assault or battery) and its proper consequences, and the master or parent for the loss of service or assistance.<sup>2</sup> Double breach of duty.

**388.** There will be this difference however between the rights of action of the master and the servant (using these terms generically), that the latter will be entitled to recover judgment for the mere assault and battery, though no damage were actually inflicted; while the former will be entitled to judgment only in case he can prove either (1) that the violence committed was such as to disable the person who sustained it from rendering the amount of aid which he or she was able to render before the act complained of; or (2) that such person was, by reason of the violence, caused to depart from or abandon the service or abode of the plaintiff.<sup>3</sup> That is, the Distinction between master's action and servant's.

<sup>1</sup> Year Book, 19 Hen. 6, pp. 43, 56; L. C. Torts, 270.

<sup>2</sup> The relation of parent and child is for such purpose the relation of master and servant. That is not true of the relation of husband and wife; but whether the husband could recover alone for a battery committed upon his wife without proving special damage, quære?

<sup>3</sup> The authorities upon this subject are mostly ancient, but they are still law. See L. C. Torts, 226, 227.

master must have sustained an actual damage;<sup>1</sup> but if he has thus been injured, he is entitled to recover therefor, even though the defendant's act consisted only in violent demonstrations. For example: The defendants, by menaces and angry demonstrations against the plaintiff's servants, cause them to leave and abandon the plaintiff's service. The defendants are liable; though no bodily violence was committed upon the servants.<sup>2</sup>

**389.** The plaintiff must either have been entitled to require the services of the party assaulted or beaten, or he must have been in the actual enjoyment of them, if they were gratuitous. A *parent* cannot maintain an action for an assault or a battery committed upon his child after the child's majority, unless he or she was then actually in the parent's service; nor could the parent maintain an action for such an injury committed upon his child during the child's minority, if the parent had in any way divested himself of the right to require his child's services.<sup>3</sup>

**390.** It is laid down that, apart from malicious interference, only the parties to a contract (and their successors in right) can maintain an action for a breach thereof; and hence if, in the course of performing a contract between the defendant and the plaintiff's servant, the defendant commit a battery upon the servant, which battery works a breach of the terms of the contract, the plaintiff has no right of action for the loss of service following. For

<sup>1</sup> In the case of an assault or battery upon one's wife, the husband at common law joined in the action; but the real *right* of action lay in the wife. And in times of servitude the master could, it seems, sue in trespass for an assault or battery committed upon his villein, even though the former sustained no damage. L. C. Torts, 227.

<sup>2</sup> Year Book, 20 Hen. 7, p. 5; L. C. Torts, 226. These are cases of the use of wrongful *means*; they are to be distinguished from cases of persuasion. See ante, chaps. iv., v.

<sup>3</sup> Questions of this sort have generally arisen in actions for seduction. See ante, 135 et seq.

example: The defendants, common carriers of passengers, are paid by the plaintiff's servant for safe passage from A to B. On the way the servant is assaulted, bruised, and injured by servants acting for the defendants, the defendants thus failing to carry the servant safely according to their agreement; whereby the plaintiff loses the injured person's service for a period of nineteen weeks. The plaintiff is not entitled to recover; the injury being deemed to be due to breach of duty to the servant alone.<sup>1</sup>

**391.** By the common law, rights of civil action for injuries done to the person (and indeed all rights of action *ex delicto*, except for the wrongful taking or detention of **Death of par-** property and like acts<sup>2</sup>) cease with the death of **ties.** the party injured or of the wrongdoer. 'Actio personalis moritur cum persona.' And this rule, though not without strong doubts, has been held to apply to actions by masters

<sup>1</sup> Compare *Alton v. Midland Ry.*, 19 C. B. N. S. 213; s. c. 15 Jur. N. S. 672; *Fairmount Ry. Co. v. Stutler*, 54 Penn. St. 375. See *Taylor v. Manchester Ry. Co.*, 1895, 1 Q. B. 134, 140; *id.* 944; *Harvard Law Rev.*, Nov. 1895, p. 215; *post*, pp. 398-401.

The contract-duty may or may not be the only duty in the case. If I buy a gun for myself only, the contract-duty of the seller in regard to the proper making of the gun is to me alone. See *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387, 390. But if the seller understands that the rights of another are involved, — that another also is to use the gun, — then there is a duty to that person as well as to me. *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338, Exch. Ch. See also *Thomas v. Winchester*, 6 N. Y. 397; *Cases*, 567. The real reason then for the decision in the example of the text appears to be, that the defendant did not know of the rights of any one but the servant. Duty imports observed or observable danger. *Ante*, p. 12.

<sup>2</sup> *Ante*, pp. 49, 50. See *Phillips v. Homfray*, 24 Ch. Div. 439; also the early statutes, 4 Edw. 3, c. 7, 25 Edw. 3, st. 5, c. 5, and the modern one, 3 & 4 Wm. 4, c. 42; *Pollock*, *Torts*, 59, 2d ed. And *Lord Campbell's Act*, 9 & 10 Viet. c. 93, copied very widely in this country, with slight changes, gives a right of action to the personal representative 'for the benefit of the wife, husband, parent, and child of the person' killed. See *Seward v. The Vera Cruz*, 10 App. Cas. 59 (overruling *The Franconia*, 2 P. D. 163); *Pym v. Great Northern Ry. Co.*, 4 Best & S. 396, Ex. Ch.; *Bulmer v. Bulmer*, 25 Ch. D. 409.



for the killing of their servants.<sup>1</sup> The rule that the action dies with the death of either party permits however an action by the master for damages between the time of the injury of the servant and his death, where death was not immediate.<sup>2</sup>

<sup>1</sup> *Osborn v. Gillett*, L. R. 8 Ex. 88, Bramwell, B., dissenting strongly. See also Pollock, Torts, 57, 58, 2d ed.

<sup>2</sup> *Baker v. Bolton*, 1 Camp. 493; *Osborn v. Gillett*, L. R. 8 Ex. 88, 90, 98; *Sullivan v. Union Pacific R. Co.*, 1 Cent. L. J. 595. See also *Insurance Co. v. Brame*, 95 U. S. 754; 2 Southern Law Rev. N. S. 186; Harvard Law Rev., Dec. 1900, pp. 290, 291.

## CHAPTER IX.

### FALSE IMPRISONMENT.

*Statement of the duty.* A owes to B the duty not to impose a total restraint upon B's freedom of locomotion.

The terms 'writ,' 'warrant,' 'precept,' and 'process' are, in this chapter, used as equivalents, wherever it is not necessary to distinguish them.

The term 'irregular,' as applied to a writ, refers to some improper practice on the part of the person who obtains the writ, as distinguished from 'error,' in decision.<sup>1</sup> A writ is sometimes absolutely void for irregularity,<sup>2</sup> sometimes only voidable.

By comparatively recent statutes, arrest in civil suits has been prohibited, except in a few special cases,<sup>3</sup> so that the particular facts of many of the older authorities no longer appear; but the principles upon which they rested have not been changed.

#### § 1. OF THE NATURE OF THE RESTRAINT: WHAT MUST BE PROVED, ETC.

**392.** A false imprisonment consists in the total, or substantially total, restraint of a man's freedom of locomotion.<sup>4</sup> Proof of such restraint will make a *prima facie* case. The act may be committed not only by placing a man within prison walls, but also by restraint im-

Definition.

<sup>1</sup> See *Everett v. Henderson*, 146 Mass. 89; *Cases*, 232.

<sup>2</sup> As a writ in execution of a judgment which has been discharged to the knowledge of the person suing out the same. *Deyo v. Van Valkenburgh*, 5 Hill, 242.

<sup>3</sup> See e. g. Mass. Pub. Stats. c. 162, §§ 1-3.

<sup>4</sup> *Bird v. Jones*, 7 Q. B. 742, 752.

posed upon him in his own house or room, or in the highway, or even in an open field.<sup>1</sup>

**393.** Any general restraint is sufficient to constitute an imprisonment; and though this be effected without actual contact of the person, it will be presumptively actionable. Any demonstration of physical power which, to all appearance, can be avoided only by submission, operates as effectually to constitute an imprisonment, if submitted to, as if any amount of force had been exercised. For example: The defendant, an officer, says to the plaintiff, 'I want you to go along with me,' with a show of authority, or of determination to compel the plaintiff to go. This is an imprisonment, though the defendant do not touch the plaintiff.<sup>2</sup>

**394.** A person may also be imprisoned, though he had not the full power of locomotion before the restraint was imposed. It appears to be sufficient if his will has been so overcome that he would not attempt to escape the restraint if he had the physical ability of locomotion. For example: The defendant, a creditor of the plaintiff, goes with an officer to the plaintiff's house, in order to compel him to give security for or make payment of his debt, which is not due. The plaintiff is found sick in bed; whereupon the officer tells him that they have not come to take him, but to get a certain article of property belonging to the plaintiff, though, if he will not deliver that or give security, they must take him or leave some one in charge of him. The plaintiff, much alarmed, gives up the article. This is an imprisonment.<sup>3</sup>

**395.** The submission therefore to the threatened and reasonably apprehended use of force is not to be considered as a consent to the restraint, within a maxim which has frequent application in the law of torts, '*volenti non fit injuria.*'

<sup>1</sup> Lib. Ass. (22 Edw. 3), p. 104, pl. 85.

<sup>2</sup> *Brushaber v. Stegemann*, 22 Mich. 266, 268. See *Hill v. Taylor*, 50 Mich. 549.

<sup>3</sup> *Grainger v. Hill*, 4 Bing. N. C. 212; Cases, 67.

And the imprisonment continues until the party is allowed to depart, and is involuntary until all general restraint ceases, and the means of effecting it are removed.<sup>1</sup>

396. It is not enough that restraint is imposed upon one's freedom of proceeding in a particular desired direction. The detention must be such as to cause escape in any direction to amount to a breach of the restraint; Circumscribing restraint. the restraint should be circumscribing, except perhaps where the only place of escape is an almost impassable one. For example: The defendant, an officer, stationed at a particular point to prevent persons from passing in a certain direction, restrains the plaintiff from passing that way, but leaves another way open to him, of which however he does not wish to avail himself; and thus detained the plaintiff stands there for some time. This is not an imprisonment.<sup>2</sup>

397. It follows from the last proposition, and from what had been stated before, that a person detained within walls is none the less imprisoned by reason of the fact Prison walls not necessary. that he may make an escape through an unfastened window or door; since such an act would be a breach of the restraint. If it would not be, there is no imprisonment; supposing that the unfastened door or window affords a ready means of escape.

## § 2. OF ARRESTS WITH WARRANT.

398. Supposing the restraint imposed to amount to an imprisonment, it is proper next to consider how the presumptive right of action for such an act can be Justifiable arrests. overturned. How is it to be shown that the im-

<sup>1</sup> Johnson v. Tompkins, Baldw. 571. 602.

<sup>2</sup> Bird v. Jones, 7 Q. B. 742. 'A prison may have its boundary large or narrow, invisible or tangible, actual or real, or indeed in conception only; it may in itself be movable or fixed; but a boundary it must have, and from that boundary the party imprisoned must be prevented from escaping; he must be prevented from leaving that place within the limit of which the party imprisoned could be confined.' Id. Coleridge, J. Cases, 207, 208.

prisonment was not unlawful? In other words, how is the act, in technical language, to be justified? This may be done in several ways, all of which however will be passed over except such as relate to the administration of justice. Of justifications of that kind the most common and the most important arises where an officer has made an arrest under a lawful warrant of a court of justice.<sup>1</sup> This will now be taken for special consideration. Arrests *without* warrant by officers or by private citizens will follow in a distinct section.

399. It is to be observed at the outset that the officer, in executing his process, must arrest the person named in it. **Arrest of wrong person.** If he do not, though the arrest of the wrong person was made through mere mistake, it may be a case of false imprisonment. And this appears to be true, though the party arrested bear the same name as the party against whom the writ is directed. For example: The defendant, a constable, asks the plaintiff if his name is J. D., to which the plaintiff replies in the affirmative; whereupon the defendant takes the plaintiff into custody, the plaintiff not being the person intended by the writ. This is a case of false imprisonment.<sup>2</sup>

400. If however the plaintiff, though not the person intended by the process, should do anything to mislead the officer, and cause the latter to believe that the former was the person meant by the precept, the officer commits no breach of duty in making the arrest. The plaintiff's action is a consent, and something more. For example: The defendant, a sheriff, arrests the plaintiff under process of court, upon a representation made by her that she was E. M. D., and the person against whom the writ had issued; with the intention of procuring the defendant to arrest her under his writ. The

<sup>1</sup> Chambers v. Oehler, 107 Iowa, 155. See ante, p. 199, of arrests in civil suits.

<sup>2</sup> Coote v. Lighworth, F. Moore, 457. It is to be noticed that the plaintiff in this case did nothing to induce the officer to arrest him as the person intended.

defendant, believing the representation to be true, makes the arrest. This is not a breach of duty.<sup>1</sup>

401. The officer's process however should so describe the person to be arrested that he may know whom to arrest; or, rather, that a person whom he proposes to arrest Description of person. may know whether to resist or submit. If the warrant be defective in this particular, the officer acts at his peril in serving it; and he will be liable to any one whom he may arrest under it. For example: The defendant, a constable, arrests the plaintiff under a warrant reciting the commission of a felony by John R. M., and then commanding the officer to arrest the said *William M.* The defendant is liable for false imprisonment, though the plaintiff is the person intended.<sup>2</sup>

402. It follows that the officer may be liable if there be a misnomer in the warrant of the person intended, though the person actually meant was arrested, and that too Misnomer. (in other respects) on legal grounds. For example: The defendants cause the plaintiff, whose name is Eveline, to be arrested under the name of Emeline in the warrant. This is a breach of duty, though the plaintiff, in her proper name, was legally liable to such an arrest.<sup>3</sup> But the case would have been different had the plaintiff been known alike by either name.<sup>4</sup>

403. The officer also loses the protection of his warrant if he fails to act in accordance with the duty enjoined by it. He must follow the tenor of his process, and not surpass his authority. For example: The defendant arrests the plaintiff beyond the precincts Tenor of process to be followed. named in the warrant. This is a false imprisonment.<sup>5</sup>

<sup>1</sup> *Dunston v. Paterson*, 2 C. B. N. S. 495. The sheriff however had detained the plaintiff improperly after discovering his mistake, and for this he was held liable.

<sup>2</sup> *Miller v. Foley*, 28 Barb. 630.

<sup>3</sup> *Scott v. Ely*, 4 Wend. 555.

<sup>4</sup> *Griswold v. Sedgwick*, 1 Wend. 126.

<sup>5</sup> This is too fundamental to have been much agitated in the courts. No authority is needed for the example.



**404.** It is further to be noticed that, though the process and arrest be valid, the protection of the officer may be lost by oppressive or cruel conduct. For example: **Oppressive conduct.** The defendant, charged with a warrant simply to take the body of the plaintiff, unites with the person at whose instance the arrest is made in illegally extorting money from the plaintiff by working upon his fears. The defendant is liable for a false imprisonment.<sup>1</sup>

**405.** The officer's protection will not extend to any detention after the warrant has expired. The warrant, however valid at first, will not justify such an act. If **Detention after process has expired.** the officer has reason for holding the prisoner after the expiration of the warrant, he must procure new process. He can hold the prisoner only for a reasonable time before his examination; after that time, the warrant loses its vitality. For example: The defendant arrests the plaintiff, and takes him before a magistrate on a charge of larceny, detaining him for a period of three days, in order that the party whose goods had been stolen might have an opportunity to collect his witnesses and prove the crime. This is a false imprisonment, the detention being unreasonable.<sup>2</sup>

**406.** When an arrest has been made upon a valid warrant, the officer may detain the prisoner on any number of other valid warrants which he has at the time, or which may afterwards, during the detention, reach him. But if the officer make the arrest on void process, or in an otherwise illegal manner, he has no right to detain the party on any valid process which may be in his hands; for the officer, upon a principle elsewhere stated, cannot avail himself of a custody effected by illegal means to execute valid process.<sup>3</sup> The

<sup>1</sup> *Holley v. Mix*, 3 Wend. 350. In such a case the process appears to be used as a mere subterfuge to cover an unlawful purpose and act. Hence it is that not merely the subsequent act but the arrest itself is unlawful. See post, pp. 242-244; *Grainger v. Hill*, 4 Bing. N. C. 212; *Cases*, 67.

<sup>2</sup> *Wright v. Court*, 4 B. & C. 596. The prisoner should have been taken before a magistrate at once.

<sup>3</sup> *Hooper v. Lane*, 6 H. L. Cas. 443.

prisoner should first be permitted to go at large, and then arrested under the valid warrant. For example: The defendant improperly arrests the plaintiff without a warrant, and while holding him in custody delivers him to an officer. The defendant afterwards receives a valid warrant for the plaintiff's arrest from an officer who held it at the time of the arrest. The plaintiff has a right of action for a false imprisonment.<sup>1</sup>

407. The principle to be derived from the cases (to restate this important doctrine in the language of the courts) is then that where the officer legally arrests the party in one action, the arrest operates virtually as an arrest in all the actions in which the officer holds valid writs against him at the time; for it would be an idle ceremony to arrest the party in the other cases. And this detainer will hold good, though the court may, upon collateral grounds, unconnected with the act of the officer, order the party to be discharged from the first arrest. But where the officer has illegally arrested the party, he is not in custody under the first warrant, but is suffering a false imprisonment; and such false imprisonment, being no arrest in the original action, cannot operate as an arrest under the other warrants in the officer's hands.<sup>2</sup>

408. It is important, in the next place, to inquire into the right of an officer to retake a prisoner under the original warrant, after an escape. It is clear that if the escape was made without the consent of the officer, while the writ was still in force, that is, not fully executed, the prisoner may be retaken on the old warrant, without rendering the officer liable to an action for false imprisonment. In case of an escape permitted by the officer, his right of retaking on the old writ will depend on the nature of the case. When, in civil cases, an arrest is proper, an officer who has arrested a man may, it seems, retake him before the return of the process, though he voluntarily per-

**Recapture.**

<sup>1</sup> *Barratt v. Price*, 9 Bing. 566.

<sup>2</sup> *Tindal, C. J.*, in *Barratt v. Price*, and *Williams, J.*, in *Hooper v. Lane*, *supra*.

mitted him to escape immediately after the arrest. So at all events it was held under the old law. For example: The defendant arrests the plaintiff in civil process, and on the following day releases him upon the latter's request. Two days afterwards, the defendant rearrests the plaintiff on the old process and commits him to jail, where he remains until he gives bail; the old process not being yet returnable (that is, being still in force). This is not a breach of duty on the part of the officer.<sup>1</sup>

409. In regard to criminal cases, there has been some conflict of authority concerning the right to take the prisoner without new process. It has sometimes been decided that the prisoner may be so retaken.<sup>2</sup> In later decisions, this doctrine has been denied to be law, except in so far as it may apply to the case of a prisoner who, after escape from jail,<sup>3</sup> has returned and given himself into the custody of the officer; in that case the prisoner can be detained under the old warrant.<sup>4</sup> And this appears to be the true rule and distinction. For example: The defendant, an officer of the peace, clothed with a warrant to arrest the plaintiff upon a charge of larceny, executes the same upon her, and takes her before a justice of the peace, who receives her recognizance to appear for trial at another court upon a certain day. She is then discharged from arrest. No court is held at the place and time stated. Afterwards the defendant rearrests her upon the old warrant, and takes her before another magistrate. This is a false imprisonment.<sup>5</sup>

410. An arrest made under a void writ will generally render the officer, as has already been stated, liable to an action

<sup>1</sup> *Atkinson v. Matteson*, 2 T. R. 172.

<sup>2</sup> *Clark v. Cleveland*, 6 Hill, 344. In this case, the prisoner had been let to bail in the wrong county, and then released from custody; and, in an action by him for malicious prosecution, it was held that the plaintiff was still liable to arrest under the original warrant, and that therefore, the proceedings not being terminated, the action could not be maintained.

<sup>3</sup> That is, after the warrant has been executed.

<sup>4</sup> *Doyle v. Russell*, 30 Barb. 300.

<sup>5</sup> *Id.*

for false imprisonment. But in order to subject him to such liability, the writ must have been void on its face; that is, of no more validity than waste paper. **Void process.** If it be voidable merely, or if, though void, the fact does not appear on the face of the process, especially if the officer does not know that the process is void, it will afford a protection to the person who serves it.<sup>1</sup>

**411.** Now a writ will be void on its face (1) if it be materially defective in language; an example of which may be seen in the case above stated, **When process is void.** where the writ failed to show who was intended.

**412.** A writ will be void on its face (2) if the whole proceeding in which it was issued was beyond the jurisdiction of the court granting it. For example: The defendant executes a warrant against the plaintiff for the collection of road taxes; the warrant being issued by a justice of the peace who has no authority over such taxes. The writ is void, and the defendant is liable for false imprisonment.<sup>2</sup>

**413.** A writ will be void on its face (3) where the court, though having jurisdiction over the subject-matter of a proceeding, has no authority to institute suit by a warrant. For example: The defendant, an officer, executes a warrant for the arrest of the plaintiff in a complaint for the non-payment of wages. The court issuing the writ has jurisdiction over such cases, but has no power to issue a warrant; a summons being the only process allowed. The writ is void, and the defendant is liable.<sup>3</sup>

**414.** In such cases, the writ showing its invalidity upon its face, the officer is not bound to serve the process. The effect of the second and third of these rules is to require the officer to know the general extent of the jurisdiction of the court which he is serving. Further than this the law does not go; and in other cases the officer will be protected, though his writ, being void-

**Officers must know the general jurisdiction of the court.**

<sup>1</sup> *Tarleton v. Fisher*, 2 Doug. 671; *Deyo v. Van Valkenburgh*, 5 Hill, 242.

<sup>2</sup> *Stephens v. Wilkins*, 6 Barr, 260.

<sup>3</sup> *Shergold v. Holloway*, 2 Strange, 1002.

able, is liable to be set aside for error, or even though it is actually void.<sup>1</sup> Cases of this kind are always within the limits of the court's general jurisdiction; and the officer is not liable, since, though bound to know the extent of the court's jurisdiction, he is not presumed to know the nature and propriety of all the proceedings in a cause. If the officer does in fact know that the court has no jurisdiction, then, by some authorities, the process is deemed to be void on its face;<sup>2</sup> but the better rule is, that an officer should not be permitted to refuse to serve process because merely of his own knowledge — or interpretation of facts, for that is what it would come to. Hence he should not be liable for serving the process in such a case.<sup>3</sup>

415. If his writ does not indicate its invalidity on its face, the officer is ordinarily safe, though the writ ought not to have issued.

416. To put the case in the form of a more general proposition, as laid down upon great consideration, a ministerial officer is protected in the execution of process, whether the same issues from a court of limited or of general jurisdiction, though such court have not in fact authority in the particular instance, provided that on the face of the process it appears that the court has jurisdiction of the subject-matter, and nothing appears therein to apprise the officer that the court has not authority to order the arrest of the party named in the process. For example: The defendant, a constable, arrests the plaintiff under a warrant from a justice of the peace issued upon a judgment against the plaintiff in an action within the jurisdiction of the court. The court has authority in such cases to issue a warrant, but in this particular instance the suit has not been instituted by the issuance of the necessary process for the appearance of the then de-

Process within the general jurisdiction of the court, but invalid in fact.

<sup>1</sup> See *Deyo v. Van Valkenburgh*, 5 Hill. 242.

<sup>2</sup> *Tellefsen v. Fee*, 168 Mass. 188, Knowlton, J., dissenting.

<sup>3</sup> *Wilmarth v. Burt*, 7 Met. 257, 260, 261, Shaw, C. J.; *Tierney v. Frazier*, 57 Texas, 437, 440, 441; also cases cited in *Tellefsen v. Fee*, *supra*.



defendant, now plaintiff. The defendant has violated no duty to the plaintiff, and is not liable, though the court had no authority to issue the warrant under such circumstances, the process not indicating the fact.<sup>1</sup> Again: The defendant, an officer, arrests the plaintiff, a member of the Legislature, privileged at the time from arrest, the writ not indicating the fact. This is not a false imprisonment.<sup>2</sup>

417. The clerk of the court (probably) will also, like the officer who serves the precept, be liable in case he made out the writ in a defective form. He has done that When the clerk is liable. which he has no right to do, and is therefore forbidden to do; and he must accordingly stand upon the same footing with the officer.

418. The clerk may also be liable when the officer who serves the writ is not liable. And this will be the case whenever the writ, though regular on its face (and hence a justification to the officer), was issued without orders of the court, under circumstances in which such issuance is not by law allowed. For example: The defendant, clerk of an inferior court, issues a writ of *capias* on which the plaintiff is arrested, without the presence or intervention of the court, upon a default of the plaintiff, as to the granting of which the law requires that the judge should exercise certain judicial functions. The defendant is guilty of a breach of duty, and is liable to the plaintiff; and this too though he only conformed to the usual practice of the court in such cases, since a court cannot delegate its judicial functions.<sup>3</sup>

419. The clerk will also (probably) be liable, like both the officer and the judge, when the writ, issued by order of the court, shows upon its face that the whole cause was without the jurisdiction of the judge. It will be different however if, while the proceeding was within the jurisdiction of the court, the particular act merely, commanded by the court, was in excess of its jurisdiction, without the clerk's knowl-

<sup>1</sup> *Savacool v. Boughton*, 5 Wend. 170; *Cases*, 216.

<sup>2</sup> *Tarlton v. Fisher*, 2 Doug. 671.

<sup>3</sup> *Andrews v. Marris*, 1 Q. B. 3.



edge. The clerk is merely a ministerial officer, like the sheriff or constable, and is no more bound than such officer to know of the legality of orders of the court within its jurisdiction. For example: The defendant, clerk of a county court, by order of the judge signs and seals a warrant for the arrest and imprisonment of the plaintiff for a period of thirty days, after a certain date, upon failure to conform to an order of court; when the order of commitment should have required an earlier arrest. The defendant is not liable, though the judge (as will be seen) would be.<sup>1</sup>

420. The judge of an inferior court, if he authorizes the arrest, is liable whenever the officer, acting in strict accordance with his precept, is liable; provided the precept be not void for defective language. As the judge does not make out the writ, he cannot be liable for such defect; and the clerk is not his agent or servant.<sup>2</sup> In other cases, that is when the court has not jurisdiction of the cause, the proceeding is *coram non judice*; the court loses its judicial function, and the judge becomes a mere private citizen.<sup>3</sup>

421. But more than this, the judge may be liable when the officer is not. This will be true whenever the judge has plainly exceeded his jurisdiction, though in a matter not affecting the officer. For example: The defendant, a justice of the peace, fines the plaintiff under the game laws, as he may do, and then sends him to jail without any attempt to levy the penalty upon his goods, which he has no right to do. He is liable for false imprisonment; though the officer who executes the writ is not.<sup>4</sup>

<sup>1</sup> *Dews v. Riley*, 11 C. B. 434.

<sup>2</sup> *Carratt v. Morley*, 1 Q. B. 18.

<sup>3</sup> *The Marshalsea*, 10 Coke, 68 b; s. c. L. C. Torts, 278, note.

<sup>4</sup> *Hill v. Bateman*, 2 Strange, 710. The arrest was justifiable, so far as the sheriff was concerned, because, though in the particular instance unauthorized, it was still within the power of the justice to grant such a writ in a proper case; that is, after an ineffectual attempt to levy the penalty upon the party's goods. The officer was not bound to know whether such an attempt had been made. Possibly he might be thought

422. When the question of the court's jurisdiction turns on matter of fact, it is laid down as well settled that a judge of a court of record with limited jurisdiction, or a justice of the peace acting judicially, with special and limited authority, is not liable to an action of trespass (of which the action for false imprisonment is an example) for acting without jurisdiction, unless he had the knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction.<sup>1</sup> And it lies upon the plaintiff in every case to prove the fact.<sup>2</sup> For example: The defendant, a justice of the peace, having jurisdiction to grant a *capias* in certain classes of civil offences, committed within his district, orders the arrest of the plaintiff, on suit brought against him by a third person, for an offence committed without his district. The defendant however has no knowledge that the act was committed beyond his district, nor is he put upon notice of the fact by anything arising before the arrest. He is not liable for a false imprisonment,<sup>3</sup> unless he acted maliciously and without probable cause.<sup>4</sup>

423. When however the question of jurisdiction does not depend upon the proof of certain facts, but upon a question of plain law, the judge granting the writ<sup>5</sup> acts at his peril;

liable had he known that no such attempt had been made; and this knowledge might perhaps have been easily proved. The cases are conflicting. See ante, p. 208.

<sup>1</sup> *Calder v. Halket*, 3 Moore, P. C. 28, Parke, B.; *Pease v. Chaytor*, 32 L. J. Mag. Cas. 121, Blackburn, J.

<sup>2</sup> *Calder v. Halket* and *Pease v. Chaytor*, supra, in which *Carratt v. Morley*, 1 Q. B. 18, apparently contra, is doubted.

<sup>3</sup> See *Pease v. Chaytor*, supra, opinion of Blackburn, J., at pp. 125, 126, from which this example is framed. Another example may be seen in *Lowther v. Radnor*, 8 East, 113, 119. A distinction must however be noticed (which was pointed out in *Pease v. Chaytor*) between a proceeding to prevent the enforcement of a judgment in such a case — *that* would be proper — and an action against the judge of the court, as in the example.

<sup>4</sup> *Id.* In such a case, the suit would properly be an action for malicious prosecution.

<sup>5</sup> That is, the magistrate originally acting; not, it seems, a superior judge to whom the case may have been taken.

and then if he order the arrest of an individual when he has no jurisdiction, not determinable on facts, he will be liable for false imprisonment. For example: The defendant, judge of a court of record of limited jurisdiction, directs the arrest of the plaintiff for contempt of the process of the court, and commits him to jail. The commitment is unauthorized, and is made under a mistake of plain law about the powers of the defendant, and not under mistake as to the facts; the statute requiring that the process (under the circumstances) should have been issued by the court of another county. The defendant is liable.<sup>1</sup>

424. From the statement of the foregoing principles and examples, it will be seen (1) that the officer alone may be liable for false imprisonment; as where he executes his writ upon the wrong person, without the latter's fault: (2) that the clerk alone may be liable; as where, without direction from the judge, he issues a precept regular in form, and within the jurisdiction of the court, but which he had no right at all to issue: (3) that the judge alone may be liable; as where, having jurisdiction over the cause, he orders the issuance of the warrant under circumstances in which the act was improper: (4) that the officer and the clerk may be liable; as where the writ contains substantially defective language: (5) that all three may be liable; as where the whole cause, in the course of which the writ is issued (at the command of the judge), is without the jurisdiction of the court.

425. This is not all. The liability for a false imprisonment may extend to the attorney at whose instance the proceeding was begun, and, further still, to his client who authorized him to begin it. Indeed, this will always be the case wherever it can be properly said that the wrongful imprisonment was ordered or participated in by the client.

426. When the judge assumes the power of ordering the warrant, upon a statement of the grounds, the act (with the

**Liability of attorney: act of judge on false representations.**

<sup>1</sup> Houlden v. Smith, 11 Q. B. 841.

exception to be stated presently) is his own, and not the attorney's or his client's;<sup>1</sup> and this too in America, though the writ were asked for on false representations;<sup>2</sup> the attorney or client has not set a ministerial but a judicial officer in motion.<sup>3</sup> If this be the extent of the connection of the attorney and client with the arrest, neither can be liable, whether the writ was granted upon a mistaken view of the case by the judge in regard to his jurisdiction (in which case *he* might be liable), or was issued in a materially defective form (in which case the clerk and the officer would be liable); the act is that of another. Illustrations may be seen in the examples above given. Hence the attorney and client may not be liable, though the process was void on its face.<sup>4</sup>

427. It is laid down in England, contrary to recent American authority, that when the warrant was issued under false representations, or even through mistake of counsel or client, the act is not the act of the judge, unless he had no jurisdiction to grant the process, but of the attorney, and of his client whom he represents.<sup>5</sup> The consequence is, that both are there liable for false imprisonment upon the execution of

<sup>1</sup> *Cooper v. Harding*, 7 Q. B. 928; *Williams v. Smith*, 14 C. B. N. S. 596; *Smith v. Sydney*, L. R. 5 Q. B. 203.

<sup>2</sup> *Everett v. Henderson*, 146 Mass. 89; *Cases*, 232.

<sup>3</sup> In this appears a clear distinction between an action for false imprisonment and one for malicious prosecution. 'The party making the charge [before a magistrate] is not liable in an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and the judgment of a judicial officer are interposed between the charge and the imprisonment.' *Austin v. Dowling*, L. R. 5 C. P. 534, 540, Willes, J.

<sup>4</sup> *Carratt v. Morley*, 1 Q. B. 18. The author withdraws his criticism on this case, made in his *Leading Cases on Torts*, p. 280. The client had done nothing but to ask for a writ; and the court, acting judicially, granted it. The act was therefore the act of the judge, and not of the party. The latter, to be liable, must either have directed the execution of the writ after its issuance, or have obtained it from the court in an irregular manner, or have participated in the execution of it.

<sup>5</sup> *Williams v. Smith*, 14 C. B. N. S. 596; *Codrington v. Lloyd*, 8 Ad. & E. 449; *Collett v. Foster*, 2 Hurl. & N. 356. See *Davies v. Jenkins*, 11 M. & W. 745.

the warrant, even though they take no further steps in the matter than those involved in obtaining the same.<sup>1</sup> For example: The defendants, attorney and client in a former suit against the present plaintiff, obtain a warrant therein for the latter's arrest upon material misrepresentations made in an affidavit upon which the warrant is awarded, on account of which misrepresentations the warrant is, after the plaintiff's arrest, set aside. They are both liable.<sup>2</sup> Again: The defendant, by his attorney, in a former suit against the now plaintiff, procures the arrest therein of the last named under a writ issued by mistake against a person not bearing the name of the present plaintiff. This is a false imprisonment, and the defendant is liable, although the person intended was arrested.<sup>3</sup> Again: The defendants, attorney and client in a former civil action against the now plaintiff, in which they obtained judgment against him, obtain a warrant for the arrest of the plaintiff by virtue of the judgment, after a discharge therefrom of the plaintiff by proceedings in insolvency, of which the defendants had notice. They are liable for false imprisonment; unless it can be shown that the discharge was obtained by fraud.<sup>4</sup>

428. The attorney, and his client with him, may, in other cases also, become liable where the arrest has been ordered by the judge. Such a result will come about whenever the

<sup>1</sup> This, in England, appears to be considered as irregularity, which is the act of the party and not of the court. In Massachusetts, issuing the writ on false representations would be *error*, which is the act of the court. *Everett v. Henderson*, 146 Mass. 89; Cases, 232.

<sup>2</sup> *Williams v. Smith*, 14 C. B. N. S. 596. The action was not sustained in this second suit, because the misrepresentations were not material.

<sup>3</sup> See *Jarmain v. Hooper*, 6 Man. & G. 827.

<sup>4</sup> *Deyo v. Van Valkenburgh*, 5 Hill, 242. This is the exception alluded to above, by which the attorney and client are liable, though the judge has been merely asked to grant the warrant. But it was misconduct to ask for the warrant when it was known that the judgment had been discharged, unless proof could be brought that the discharge was fraudulent. The judge, having no jurisdiction to grant the warrant in such a case, would also be liable, it seems.



attorney participates in any manner in effecting the arrest after the issuance of the improper warrant. For example: The defendants, attorney and client in a former litigation against the present plaintiff, having obtained an erroneous warrant against the latter from the judge, the attorney personally puts the precept into the officer's hands, and directs him to serve it. The defendants are both liable; the attorney because of his personal interference, the client because bound by the act of his attorney in the ordinary course of the litigation.<sup>1</sup> Again: The defendant, an attorney, indorses with his name and residence an invalid warrant, issued against the plaintiff. This makes him a participant in the false imprisonment which follows;<sup>2</sup> and his client also.

**429.** It will thus be seen that there may be cases in which all the parties named will be jointly liable, client, attorney, officer, clerk, and judge. Such will be the result where the attorney personally directs the officer to serve a writ upon the plaintiff, issued by the judge's order, in a civil cause, wholly beyond the jurisdiction of his court.

**430.** A certain fundamental difference between civil and criminal cases should be noticed; the parties are different. A civil suit is a litigation between individuals; a criminal suit is a litigation between the public and an individual. The prosecutor in a criminal action does not represent the plaintiff in a civil suit. A civil proceeding is instituted in the interest and for the benefit of the plaintiff, and is under his control throughout; the plaintiff is 'dominus litis.' False steps and misconduct on his behalf in the course of the litigation will therefore bind him, as has already been seen. The prosecutor of crime however is not a party to the litigation instituted by him. The proceeding is not carried on primarily in his

Liability of  
attorney and  
client.

Summary.

Difference be-  
tween civil  
and criminal  
actions.

<sup>1</sup> *Barker v. Braham*, 2 W. Black. 866; s. c. L. C. Torts, 235.

<sup>2</sup> *Green v. Elgie*, 5 Q. B. 99.



interest; and he has no control over its course. The consequence is, he cannot be bound by the action of the attorney-general or other prosecuting officer. He may however bind himself, and become liable for a false imprisonment by acts of his own, or of counsel whom he may employ to assist the attorney-general. If the prosecutor or his attorney should personally direct the service of invalid process, whether void or only voidable, he would be liable to the party arrested.<sup>1</sup>

**431.** Before an action for false imprisonment under process of court can be maintained, it is necessary that the process should be set aside, unless it appear to be absolutely void. For if the process be merely voidable, it is valid until quashed; and hence the arrest must, till then, be legal. If however the process be absolutely void, and the action be brought against the proper party or parties, it is not necessary (probably), either in cases of civil or of criminal arrest, to have it set aside before suing for false imprisonment. For example: The defendant procures the arrest of the plaintiff on a warrant issued upon a judgment which the former knows to have been discharged; and the plaintiff sues for false imprisonment without first having the process set aside. The action is maintainable; the process being absolutely void.<sup>2</sup> Again: The defendant, a justice of the peace, procures the arrest of the plaintiff upon four convictions before him of baking bread on one and the same Sunday; the law permitting but one conviction in such a case. The defendant is liable for false imprisonment, though the wrongful convictions be not first quashed.<sup>3</sup>

**432.** In both civil and criminal cases however the action for false imprisonment is to be distinguished from a suit for

<sup>1</sup> *Hopkins v. Crowe*, 4 Ad. & E. 774.

<sup>2</sup> *Deyo v. Van Valkenburgh*, 5 Hill, 242.

<sup>3</sup> *Crepps v. Durden*, 2 Cowp. 640. In this case there was no arrest, but merely a levy on the plaintiff's goods for the amount of the penalty; but the principle would be the same.

malicious prosecution. The process under which an imprisonment was made may have been, as regards the party or parties sued for the tort, either void or voidable;<sup>1</sup> and, in such a case, the action is maintainable without proof of malice, or of want of probable cause, or of the termination of the prosecution. In an action for malicious prosecution however it matters not whether the writ was void, voidable, or valid; the suit is for an unlawful prosecution, and to make such a case the plaintiff must prove the set of facts just stated.

Malicious  
prosecution  
distinguished.

### § 3. OF ARRESTS WITHOUT WARRANT.

433. It is not necessary however, in all cases, that an arrest for an infraction of the law should be made under authority and by command of a warrant. There are occasions on which the utmost promptness of action is required for the attainment of the ends of justice in the apprehension of law-breakers; and the necessities of society have in such cases furnished a justification for the arrest of offenders without a formal warrant of a court of justice. But the law does not encourage the making of arrests in this manner; on the contrary, in the interest of liberty, it prefers a slower and more deliberate proceeding by warrant, issued upon solemn oath concerning the facts, in all cases in which the administration of justice can thus be efficiently carried out.

Occasions for  
acting with-  
out process.

434. The occasions on which arrests without a warrant are considered justifiable upon the above-stated ground are well defined. In the first place, it must be well understood that the right to make such arrests is confined altogether to infractions of the criminal law. In no case can an officer make an arrest in a civil cause without the protection of a warrant. It may be true, as has already been stated, that, in cases of

<sup>1</sup> It will be noticed that to sustain an action against the officer who served the writ, or against the clerk, the writ must have been void on its face; while it is enough in *this* respect, to sustain an action against the judge or attorney and client, that the writ was only voidable.

the release of a prisoner arrested on process in a civil action, the officer may retake the party without obtaining a special warrant for this particular purpose; but that is because he has already a warrant, which is still in force. Hence, the officer does make the arrest under a writ; and he must justify his act under that writ.

**435.** The first case to be mentioned in which an arrest can be made without a warrant, is when the arrest is made upon the spot, at the time of the breach of the peace. **Arrest on the spot.** Such a case comes directly within the reason above mentioned, namely, the necessities of society; nor could there be any use of requiring an affidavit and warrant in such a case, even if the delay might not be fatal. The right thus to arrest on the spot applies equally to all breaches of the peace, whether the act be a crime or a misdemeanor.

**436.** An arrest without warrant may also be made by an officer of the law, qualified for the making of arrests, upon **On suspicion:** 'suspicion of felony,' to use a common expression of the books. The meaning of this is, that **probable cause.** if in an action for false imprisonment, without warrant (that is, *because* without warrant), the officer can show that, though no felony was in fact committed, he had *probable cause* to suppose that the prisoner had committed such a crime, he has violated no duty to the plaintiff in thus making the arrest. For example: The defendant, a constable, having probable cause to believe that the plaintiff is guilty of the felony of receiving or aiding in the concealment of stolen goods, arrests him without a warrant, and conveys him to jail, where he detains the prisoner until he can make application to a magistrate for a warrant against him as a receiver of stolen goods. The warrant is refused, and the prisoner at once discharged. The defendant is not liable.<sup>1</sup>

**437.** In these cases, since the officer has no warrant to justify him, he has to show probable cause for the arrest. The

<sup>1</sup> Rohan v. Sawin, 5 Cush. 281. Note that the magistrate's *subsequent* action has no bearing on the officer's justification of probable cause. Compare ante, pp. 99, 102, note 2.

officer's action is not a setting in motion of the courts, as it is in a prosecution by a prosecutor or plaintiff; hence the difference, in regard to proving probable cause, between a suit for false imprisonment and one for malicious prosecution.

438. The officer's 'suspicion' must of course, as above intimated, be a reasonable ground to suppose the prisoner guilty of a felony; that is, it must be such a strong suspicion as would justify a man of caution in entertaining a belief of the party's guilt. If the circumstances do not warrant such a belief, even though in fact a felony has been committed, the officer violates his duty to the plaintiff by arresting him without process of court.<sup>1</sup> For example: The defendant, a constable, arrests and imprisons the plaintiff, without process, under the following circumstances: The cart of the plaintiff, a butcher, is passing along the highway, when a person, in the habit of attending fairs, stops the cart and says to the officer (defendant), 'These are my traces, which were stolen at the peace-rejoicing last year.' The defendant asks the plaintiff how he came by the traces. The plaintiff replies that he saw a stranger pick them up in the road, and bought them of him for a shilling; whereupon he is taken into custody, and, on examination before a magistrate, discharged. This does not show probable cause for the arrest, and the defendant is liable.<sup>2</sup>

439. In the authority from which this example is taken, the whole case was given to the judges, with power to act as a jury so far as might be necessary for the decision of the question before them. It therefore does not appear from the decision, whether the question of probable cause is to be considered as a question for the

Who decides  
probable  
cause.

<sup>1</sup> Process would justify the officer in such a case; although the granting of it falls short of a judicial finding that there exists probable cause to believe the party guilty, — upon which, if there were such a finding, the officer might in principle be justified in acting even if he were not bound to act. But acting without process, the officer has to prove probable cause. The term 'probable cause' here, as in the chapter on Malicious Prosecution, is used for 'reasonable and probable cause.'

<sup>2</sup> *Hogg v. Ward*, 3 H. & N. 417; Cases, 244.

judge or for the jury; and the point was expressly left undecided by the judges.

440. The question has indeed been one of some difficulty. In some of the cases it has been tacitly assumed that the jury must determine whether the officer had probable cause for taking the plaintiff into custody;<sup>1</sup> in others, that it is for the court to say whether the facts proved show proper cause.<sup>2</sup> The point has however been decided in England in accordance with this latter view, though not without expressions of regret;<sup>3</sup> making the rule to conform to that of actions for malicious prosecution.

441. If the analogy furnished by the law of actions for malicious prosecution is to be fully carried out, and it appears reasonable that it should be, it will also be necessary for the officer to show that this reasonable ground for making the arrest consisted of facts within his own possession at the time of the arrest, and that he cannot justify on facts which afterwards came to his notice. Nor, on the other hand, if his justification lie in the facts before him at the time of taking the party into custody, will his defence be overturned by evidence of facts indicating innocence, that came to his notice after the imprisonment.<sup>4</sup>

442. At common law, no valid arrest without a warrant can be made for a misdemeanor, except on the spot.<sup>5</sup> To arrest  
**Arrest for** a man, without process, on suspicion that he has  
**misdemeanor.** committed a misdemeanor, although upon probable cause for his arrest, is a breach of duty. For example: The defendant, a constable, arrests the plaintiff without a writ on the statement of J. M., that the plaintiff has committed the offence of perjury, by wilfully and corruptly

<sup>1</sup> *Beckwith v. Philby*, 6 B. & C. 635; *Rohan v. Sawin*, 5 Cush. 281; *Brockway v. Crawford*, 3 Jones, 433.

<sup>2</sup> *Hill v. Yates*, 8 Taunt. 182; *Davis v. Russell*, 5 Bing. 354.

<sup>3</sup> *Lister v. Perryman*, L. R. 4 H. L. 521, 531, 538, 539.

<sup>4</sup> See ante, p. 99.

<sup>5</sup> Whether and how far this may have been changed in regard to the duties of policemen in large cities cannot here be considered.



making a false affidavit in a judicial proceeding before the Honorable W. W., judge of a court, and he takes the plaintiff into custody upon this charge, at the direction of J. M. He is liable to the plaintiff for a false imprisonment;<sup>1</sup> though he would not have been had the offence charged been a felony.

**443.** And the arrest must not only have been made upon the spot; it must also have been made, in the case of an actual breach of the peace, before the breach has entirely ceased. For example: The defendant, a constable, takes the plaintiff into custody without a warrant under the following circumstances: The plaintiff had been making a disturbance about certain premises in the night-time, and had refused, on request of the defendant, to desist. Perceiving that the defendant intends to arrest him, the plaintiff flees and is pursued, overtaken, and arrested; the disturbance having previously ceased. The defendant is liable.<sup>2</sup>

**444.** In the case of affrays however an arrest may be made without a warrant not only during the actual breach of the peace, but so long as the offender's conduct shows that the public peace is likely to be endangered by his acts. Indeed, while those are assembled together who have been committing acts of violence, and the danger of renewal continues, the affray may be said to continue; and during the affray, thus understood, the officer may arrest the offender not only on his own view, but even on the information or complaint of another. This is true even of an arrest by a private citizen.<sup>3</sup> For example: The defendant arrests the plaintiff without process under the following circumstances: The plaintiff had entered the defendant's shop to make a purchase, when a dispute arose between the plaintiff and a servant of the defendant resulting in an affray between

**Affrays.**

<sup>1</sup> *Bowditch v. Balchin*, 5 Ex. 378. See *Commonwealth v. Carey*, 12 Cush. 246, 252; *Commonwealth v. McLaughlin*, id. 615, 618.

<sup>2</sup> Compare *Baynes v. Brewster*, 2 Q. B. 375, where the defendant, on such facts, was a private citizen; but the rule would have been the same had he been an officer, as the language of Mr. Justice Williams in that case shows.

<sup>3</sup> *Timothy v. Simpson*, 1 Crompt. M. & R. 757; s. c. L. C. Torts, 257; *Baynes v. Brewster*, 2 Q. B. 375, 386.



them. The defendant, coming into the shop during the affray, orders the plaintiff to leave, which he refuses to do; the violence having then ceased, though there is still danger of a renewal of the affray. The defendant now gives the plaintiff into the custody of an officer. This is no breach of duty to the plaintiff.<sup>1</sup>

445. The example given leads to the consideration of the nature of the right of a private citizen to arrest offenders without process of court; for it is (probably) lawful for such a person to make an arrest upon a warrant under the same circumstances in which an officer could do so.

Right of private citizen to make arrest.

446. The rule of law in regard to arrests for misdemeanors by private citizens is the same as prevails concerning officers; they are entitled to make the arrest without process while the breach of the peace is going on, or (in accordance with the explanation given) still continues. And a private citizen has no right to make an arrest, without process, for a misdemeanor after its termination, though the breach of peace was committed about his own premises.<sup>2</sup>

447. In regard to felonies, the rights of officers and private citizens are different. While an officer can arrest without a warrant upon probable cause, though no felony has been committed, a private citizen can safely make an arrest without a warrant only when (1) the felony charged has actually been committed, and (2) there was probable cause for supposing the party arrested to be guilty.<sup>3</sup>

<sup>1</sup> *Timothy v. Simpson*, *supra*.

<sup>2</sup> *Baynes v. Brewster*, 2 Q. B. 375, 386.

<sup>3</sup> *Allen v. Wright*, 8 Car. & P. 522; s. c. L. C. Torts, 265. In *Commonwealth v. Carey*, 12 Cush. 246, 251, Chief Justice Shaw, in a dictum, states the rule thus: 'A private citizen, who arrests another on a charge of felony, does it at the peril of being able to prove a felony actually committed by the person arrested.' But that statement, which was only a dictum, appears to be a mere slip. See *McCloughan v. Clayton*, 17 Rev. Rep. 669, and note by original reporter Lord Holt.

## CHAPTER X.

### TRESPASSES UPON PROPERTY.

*Statement of the duty.* A owes to B the duty (1) not to enter B's close without permission; (2) not to take or interfere with possession of B's chattels, without permission; unless, in either case, A has a better right than B to the possession of the property.

The term 'close' signifies a tract of land, whether physically enclosed or not.

'Breaking and entering the close' is an ancient term of the law, now nearly gone out of use, indicating an unlawful entry upon land. The term 'entry' or 'unlawful entry' will be used in the present chapter as synonymous with 'breaking and entering.'

#### § 1. WHAT MUST BE PROVED.

448. A trespass to land is an unlawful entry upon land; a trespass to goods is an unlawful taking or interfering with the possession of goods. All other wrongful acts connected with the trespass are aggravation of the wrong. Accordingly, to prove an unpermitted entry upon land in the plaintiff's possession, or the interrupting of the plaintiff's possession, or right to take possession, of goods, is necessary to make, and will make, a presumptive case.

#### § 2. OF POSSESSION.

449. In order to maintain an action solely for damages for a trespass to land, and not merely for the recovery of the land, it is necessary, apart from statute, for the plaintiff to have had possession of the premises entered at the time of the entry. A person who enters the land of another without the latter's permission, the latter having before been unlawfully deprived of posses-

Possession in  
actions for  
trespass.

sion or the land having never been in his possession, *may* indeed violate a duty to the person entitled to the possession; but the common law requires the latter to get possession of the land before giving him damages for the wrong committed. By statute, the owner may sue for possession and damages in one action.<sup>1</sup>

450. If however the party had possession at the time of the entry, and the trespasser ejected him, it would not be necessary for him to recover possession before he could sue for damages for the wrongful entry and expulsion; he had possession at the time of the trespass and disseisin, and that is sufficient for the purposes of such an action.<sup>2</sup> He could not however recover damages for the loss sustained by reason of the disseisor's *occupancy*, until after a re-entry,<sup>3</sup> or suit for recovery of possession, — a point to be further considered hereafter.

451. On the other hand, possession at the time of the entry, if held under a claim of right, is *prima facie* sufficient in all cases to enable a person to maintain an **Possession without right.** action for an entry upon the land without his permission; and possession alone is not only *prima facie* but absolutely sufficient against all persons who have not a better right than the possessor.<sup>4</sup> It follows that one who is in possession of land under a claim of title, though without right, may recover for an entry by a wrongdoer; that is, by one who enters without a right, or under one not having a better right. For example: The defendant enters without permission upon land in the possession of the plaintiff, whose possession is under a void lease. The defendant is liable.<sup>5</sup>

<sup>1</sup> In some States, if the owner sue for possession, he *must* claim his damages in the same action, or he will be barred of the right to recover them. *Raymond v. Andrews*, 6 Cush. 265. See *Leland v. Tousey*, 6 Hill, 328. If possession however is obtained without suit, an action for damages is maintainable. *Leland v. Tousey*, *supra*.

<sup>2</sup> *Case v. Shepherd*, 2 Johns. Cas. 27.

<sup>3</sup> *Id.*

<sup>4</sup> Cotenancy makes an exception. See post, p. 231.

<sup>5</sup> *Graham v. Peat*, 1 East, 244. 'Any possession is a legal possession against a wrongdoer.' Lord Kenyon. See *Cutts v. Spring*, 15 Mass. 135; s. c. L. C. Torts, 341.

452. But as above implied, the defendant is not necessarily guilty of breach of duty to such a possessor by reason of the fact that he (defendant) does not own the land. He may still have a legal or an equitable interest in the premises; he may be a lessee of the land; he may be a trustee of the estate or the cestui que trust; or he may be a licensee of one having a right of entry. In any of these cases he would be entitled to enter upon the premises, if he could do so without breaking the peace. A licensee of one having possession may make a peaceable entry against a wrongdoer, though a licensee has no interest whatever in the soil, and could have no entry against the will of a person *entitled* to the possession. For example: The defendant enters, without permission of the plaintiff, premises of which the plaintiff is wrongfully in possession; the act being done by direction of the owner of the land, who is entitled to possession. The defendant violates no duty to the plaintiff;<sup>1</sup> though the case would have been different had he entered without authority of the owner.<sup>2</sup>

453. If there be two persons in a close, each asserting that the premises are his, and each doing some act in the assertion of the right of possession, he who has the better title or right is considered as being in possession; and the other is a trespasser.<sup>3</sup> The former is therefore in a position to demand damages of the latter for his wrongful entry. For example: The defendant is in possession of land without right, and so continues after the plaintiff, who is the owner, enters to take possession, ploughing the land. The defendant is guilty of trespass to the plaintiff.<sup>4</sup> Again: The defendant is in occupancy of land jointly with the plaintiff, claiming to be a tenant in common

<sup>1</sup> Chambers v. Donaldson, 11 East, 65.

<sup>2</sup> The subject of rights of entry in general will be considered hereafter, § 3. It is introduced here merely to show the consequences of possession.

<sup>3</sup> See Reading v. Royston, 2 Salk. 423.

<sup>4</sup> Butcher v. Butcher, 7 B. & C. 399.

of the premises with the plaintiff. His claim however is unfounded, and the plaintiff is owner of the close. The defendant may be treated by the plaintiff as a trespasser.<sup>1</sup>

454. If neither of the parties in occupancy has a right to the close, the question whether either of them has violated a duty to the other, supposing each to claim possession, will turn upon the 'exclusive priority of possession.' The one who first entered, if he took exclusive possession, will be entitled to damages against the other; if he did not so take, neither can recover against the other. For example: The defendants claim a right to take cranberries in an unoccupied field under a license from one H. The plaintiffs have previously entered into possession of the land, and forbidden all persons by public notice to take cranberries therefrom, except on certain conditions, with which the defendants do not comply. H, under whom the defendants claim, had entered before the entry of the plaintiffs; but neither H, nor the defendants, nor the plaintiffs have any right to the soil or the berries; and neither ever had exclusive possession. The defendants have violated no duty to the plaintiffs;<sup>2</sup> and so in the converse case.<sup>3</sup>

455. There is this important distinction between the law relating to possession of real property and that relating to possession of personalty: to enable a plaintiff to recover for trespass to realty, he must have had a real possession;<sup>4</sup> while a plaintiff may recover for trespass to personalty if he had a *right* to take possession, — in which case he is said to have constructive possession. To assimilate the two cases, it is often said that the right to take possession of personalty draws possession in law. Whoever then has a right to the possession of a chattel, whether it be towards all the world or only towards the defendant, is in a position

<sup>1</sup> *Hunting v. Russell*, 2 Cush. 145.

<sup>2</sup> *Barnstable v. Thacher*, 3 Met. 239.

<sup>3</sup> *Id.*

<sup>4</sup> There is one exception, the case of possession of land by what is called 'relation;' of that, further on. See p. 233. That is the one true case of constructive possession of realty, in regard to trespass.

to sue for an interruption of his enjoyment thereof. For example: The defendant, without permission, takes goods out of the possession of A, after A has sold them to the plaintiff, but before they have been delivered to him. This is a breach of duty to the plaintiff.<sup>1</sup>

456. What constitutes real possession however, as distinguished from a right to take possession, is one of the difficult questions of the law, especially when it comes to the application of definition to particular cases. Meaning of possession.

Contact certainly is not necessary; it is enough for a man, so far as that is concerned, that no one else has possession, and that he has in consequence power to take the property in hand at will. Indeed, a man who is holding property of right has possession, against one who may be struggling or striving against him or others, on the spot or in court, to gain possession; this follows from what has already been stated.

457. That conception of the term possession which on the whole most nearly harmonizes with the authorities on specific situations where there is no strife over the right, appears to be this: there must be (1) a power of control over property, and (2) a purpose to exercise the same for the benefit, at the time, of the holder, or facts from which such a purpose could be assumed if the mind were directed to the object of possession.<sup>2</sup> It is clear that without these two facts there is no

<sup>1</sup> Bacon's Abr. Trespass C. 2; L. C. Torts, 370. Quære, whether possession of personalty in itself will support an action, as e. g. the possession of a thief who is dispossessed by another thief? It is urged that mere possession is enough. Pollock & Wright, Possession, 91, 93, 147, 148. It may on the other hand be urged that only that sort of possession which is capable of ripening into a title should be protected, as e. g. the possession of a finder. In the Roman law a thief could not have the 'actio furti.' Dig. 47, 2, 11; id. 47, 2, 12, 1; Inst. 4, 1, 13. See also Buckley v. Gross, 3 Best & S. 566, 573, Crompton, J. As to the criminal law of such cases see Commonwealth v. Rourke, 10 Cush. 397, 399; Pollock & Wright, Possession, 118 et seq.

<sup>2</sup> Compare London Banking Co. v. London Bank, 21 Q. B. D. 535, 542; and see Regina v. Ashwell, 16 Q. B. D. 190.



true possession in the eye of the law; but to say that there *is* possession in all cases with them would be to say that the authorities are in harmony. A mere servant may have 'detention' or custody, but, as servant, can have no possession, according to current views, because a servant does not hold in his own right;<sup>1</sup> but what of an agent,<sup>2</sup> or a bailee for hire, or a tenant at will? The authorities are not agreed. It is said that none of them has possession. Thus, some say of tenants at will, that both tenant and landlord cannot be in possession at the same time, and the landlord certainly is possessed in contemplation of law. Others treat both as having the *rights* of possessors; and this appears to be the legal view.<sup>3</sup> Agents and bailees for reward have possession, by the better view.<sup>4</sup> Indeed any bailee liable over to his bailor may, it seems, maintain trover.<sup>5</sup>

458. Knowledge of the right appears to be unnecessary to possession; if a thing of value is delivered for me, I am presumed to accept it until I refuse. The delivery, whether I know it or not, is significant of my possession; enough that no one else has possession.<sup>6</sup>

<sup>1</sup> Year Book, 13 Edw. 4, 9, 10, pl. 5; 21 Hen. 7, 14, pl. 21; Harris *v.* Smith, 3 Serg. & R. 20; Hampton *v.* Brown, 13 Ired. 18. These are all common-law authorities; but the point is not free from doubt. See Holmes, Common Law, 226-228; Moore *v.* Robinson, 2 B. & Ad. 817; Mathews *v.* Hursell, 1 E. D. Smith, 393; Regina *v.* Ashwell, 16 Q. B. D. 190.

Perhaps a reason in regard to the case of the servant is that his interest is too slight; *de minimis non curat lex*. Then the criminal side of the case may be noticed; if the servant has possession, the possession has been given to him by his master, and he cannot be guilty of larceny.

<sup>2</sup> See Knight *v.* Legh, 4 Bing. 589, Best, C. J., holding that an agent might bring trover, as having possession.

<sup>3</sup> See Starr *v.* Jackson, 11 Mass. 519, where the cases are reviewed; and see Markby, Elements of Law, § 388, 3d ed. Tenant at *will* clearly holds for himself while he *wills* and is permitted to hold.

<sup>4</sup> As to bailees see Claridge *v.* Tramways Co., 1892, 1 Q. B. 422.

<sup>5</sup> *Id.*

<sup>6</sup> It seems then that if an article is delivered to my servant, to be taken to me, and he makes off with it, with felonious intent, he is guilty of larceny from me. It was his felonious act, not the delivery of the article to him, that gave him possession.

459. A reversioner or remainder-man after an estate for years can indeed maintain an action for injuries done to his interest, notwithstanding the fact that the land is in the possession of the termor. Injuries done to such interests are not however, in strictness of common-law ideas, trespasses. The trespass consists in the wrongful entry upon the land, and this is a tort to the tenant, and not to the landlord or remainder-man; since it is an interference with the possession, which belongs to the tenant. For example: The defendant enters upon the plaintiff's land, let for years, in the assertion of a right of way, driving thereon his horses and cart, and continuing so to do after notice from the plaintiff to quit. The defendant has violated no duty to the plaintiff.<sup>1</sup>

Reversioner  
and remain-  
der-man.

460. Damage done to the inheritance in the case of leasehold or mortgaged land is waste if committed by the tenant or mortgagor, and a tort which may be deemed to be in the nature of (but not strictly as) a trespass, if committed by a stranger. But whatever term may be applied to the act, it is a breach of duty to the landlord or mortgagee, for which he is entitled to recover damages. For example: The defendant, a tenant, or a mortgagor, or a licensee, or a stranger, cuts down trees on land owned by the plaintiff, or of which he is mortgagee or remainder-man, without the plaintiff's consent. This is a breach of duty to the plaintiff, and the defendant is liable to him in damages; though the plaintiff is not in possession.<sup>2</sup>

Waste.

461. A similar rule of law prevails in regard to injuries done to personal property held on lease or on pledge, or by a mortgagor in possession. For an injury done to the possessor's interest merely, that is, for a simple unlawful taking of the goods, the remedy

Personal  
property held  
on lease or  
pledge.

<sup>1</sup> *Baxter v. Taylor*, 4 B. & Ad. 72. The action was 'case.'

<sup>2</sup> See *Young v. Spencer*, 10 B. & C. 145; *Page v. Robinson*, 10 Cush. 99; *Cole v. Stewart*, id. 181. None of these are cases of actions by remainder-men, but they cover such cases in principle. The form of action at common law is 'case' and not trespass.

belongs to the possessor alone; but for an injury done to the reversion, or to the mortgagee if the goods be mortgaged, the landlord or the mortgagee is entitled to treat the act as a breach of duty to him and call for redress.<sup>1</sup> For example: The defendant levies on and sells goods in the possession of S, whose right to the possession rests upon an agreement by the plaintiff to convey the same to him upon the payment of notes given therefor. The defendant has not been led by the plaintiff to suppose that the goods belong to S; on the contrary, the defendant has notice, at the time of the levy, of the plaintiff's title. The defendant's act in disposing of the goods is a breach of duty to the plaintiff, and he is liable in damages; though the right of possession is in S.<sup>2</sup>

**462.** A man's close includes not only his actually enclosed land, but also all adjoining unenclosed lands held by him; and, if he is in possession of any part of his premises, he is in possession of the whole, unless other parts are occupied by tenants for term of years or by persons who claim adversely to him. The owner has the 'power of control' and the 'purpose to exercise the same' for himself; he is therefore in a proper position to recover damages for trespasses committed in any part of his premises, the unenclosed as well as the enclosed.<sup>3</sup> For example: The defendant, without permission, enters and cuts timber in an open woodland of the plaintiff, adjoining a farm upon which the plaintiff resides. The plaintiff is in possession of the woodland, and is entitled to recover.<sup>4</sup>

<sup>1</sup> In 'case,' or trover, at common law. See *Farrant v. Thompson*, 5 B. & Ald. 826, where trover was brought.

<sup>2</sup> *Ayer v. Bartlett*, 9 Pick. 156.

<sup>3</sup> Such possession is often called 'constructive,' but that term, like the term 'symbolical' possession, is apt to darken counsel. Possession is surely real when one's control can be extended over the property at any time. See Markby, *Elements of Law*, §§ 353, 359, 360, 3d ed.

<sup>4</sup> *Machin v. Geortner*, 14 Wend. 239; *Penn v. Preston*, 2 Rawle, 14; *Jones v. Williams*, 2 M. & W. 326, 331; *Lord Advocate v. Blantyre*, 4 App. Cas. 770, 791; *Coverdale v. Charlton*, 4 Q. B. D. 104, 118. 'I hold that there is no usage of the country, nor rule of the common law, nor any reason requiring a man to enclose his timber land, and that for

**463.** The foregoing proposition in regard to possession of adjoining unenclosed land supposes that the party injured has a right to the possession of the enclosed premises actually occupied by him. One however who is in possession of land without title or right can have no such extended possession; the rights of a bare possessor are limited by the bounds of his immediate occupation and control. For example: The defendant, having wrongful possession of the south end of a lot, cuts timber upon the north end thereof, lying without the limits of his actual occupation; which timber has been purchased and duly marked by the plaintiff. The land on which the timber stood is not in the possession of the defendant, and the plaintiff is entitled to damages for the violation of his right of property; though he has no right to the land.<sup>1</sup> Again: The defendant, without right or authority, enters upon an open woodland adjoining enclosed land in the wrongful possession of the plaintiff. The act is no breach of duty to the plaintiff.<sup>2</sup>

**464.** One of several cotenants, whether of real or of personal property, cannot maintain an action for acts relating to the common property, not amounting to an ouster; because all the cotenants have equal rights of possession and property. For example: The defendant, cotenant of land with the plaintiff, cuts and carries away therefrom timber, at the same time denying to the plaintiff any right in the premises, but not withholding possession from him. The defendant has violated no duty to the plaintiff.<sup>3</sup>

**465.** If, in the case of real estate, the act of the defendant however amount to an ouster of the plaintiff from the posses-

any possible purpose that can be named the woods belonging to a farm are as well protected by the law without a fence as with one.' Tod, J., in *Penn v. Preston*, supra.

<sup>1</sup> *Buck v. Aiken*, 1 Wend. 460. The plaintiff became possessed of the trees as soon as they were cut down by the defendant.

<sup>2</sup> It is difficult to find judicial authority for this example, because, perhaps, of its simplicity. Its correctness is clear.

<sup>3</sup> *Filbert v. Hoff*, 42 Penn. St. 97; *Reading's Case*, 1 Salk. 392.

sion of the common property, the act is a trespass, and the defendant is liable; provided, at least, an action of ejectment would at common law be maintainable. For example: The defendant, being cotenant with the plaintiff of a certain room in a coffee-house, expels therefrom the plaintiff's servant, in derogation of the plaintiff's right of occupation. The defendant is liable to the plaintiff in damages; since an action of ejectment for restoration to possession would lie.<sup>1</sup>

466. Whatever amounts, or if persisted in might amount, to an effectual privation of the associate tenant of participation in the possession of the common property  
**Ouster and ejectment.** amounts to an ouster, even though there be no actual expulsion or withholding of possession from him. For example: The defendant, cotenant with the plaintiff of a certain close, digs up the turf and carries it away, without the plaintiff's consent. This is an ouster, for which the defendant is liable to the plaintiff in damages; since, if the cotenant were permitted to take the turf, he would be entitled to dig away the soil below the turf, and might thus effectually deprive his fellow of his right to the possession.<sup>2</sup>

467. If the criterion of this remedy between cotenants for an ouster be the question whether an ejectment would be maintainable, it follows that an action for trespass in respect of *goods* held in common cannot be maintained by one cotenant against another; for an action of ejectment lies for the recovery of land only. Nor indeed is there any authority in opposition to this suggestion; the question of the right of action having, so far as the reported authorities go, always arisen in regard to common rights in realty.<sup>3</sup> Some decisions

<sup>1</sup> *Murray v. Hall*, 7 C. B. 441; Cases, 282. Ejectment was originally an action of trespass, and was always deemed to include trespass. Hence, if that form of remedy may be used, trespass lies.

<sup>2</sup> *Wilkinson v. Haygarth*, 12 Q. B. 837. The defendant would not have been liable to an action for *trespass* for taking and carrying away the growing grass or crops. *Id.* Accounting between cotenants was provided for by 4 Anne, c. 16, § 27, where one cotenant has taken more than his share of the profits. That statute has been re-enacted in effect in this country.

<sup>3</sup> See the cases cited in L. C. Torts, pp. 358-360.



in this country have denied the remedy even when resorted to in cases of real property.<sup>1</sup>

468. In respect of personal property however it will be seen in the next chapter that an action for the conversion of the common chattel can be maintained in certain cases. The difficulty thus relates more to the Conversion. form of action than to the substance of things. It may therefore be laid down, that for one tenant in common of personal property to withhold possession of the chattel from his associate, or to expel him from participation in the possession, or to appropriate to himself more than his share of the profits arising from the property, is a breach of legal duty to the latter, for which the law gives redress.<sup>2</sup>

469. It has been observed that, in order to maintain an action at common law for trespass to land, possession of the land at the time of the wrongful entry is necessary. But the common law does not allow a person who has wrongfully entered, to take and enjoy Entry and possession by relation. the profits of the land, or to commit depredations upon the premises during his occupancy, without a reckoning. If the owner or person entitled to the possession subsequently obtain possession of the land, the law treats him, by the fiction of relation, as having been in possession during all the time that has elapsed since he was ejected from the premises.<sup>3</sup>

470. The consequence is, that upon his re-entry he becomes entitled to sue for the damage which he has sustained at the hands of the party who has usurped the possession. The

<sup>1</sup> Wait v. Richardson, 33 Vt. 190. See also Bennet v. Bullock, 35 Penn. St. 364, 367.

<sup>2</sup> The difficulty in the way of an action for trespass is that the defendant, tenant in common, had a right of possession, and that is inconsistent with that action. But in an action for the conversion of a chattel, it matters not that the defendant had a right of possession. The gist of such an action is not (as it is in trespass) the wrongful taking possession, but the conversion of the plaintiff's right.

<sup>3</sup> Here is a case of true constructive possession in realty. See ante, p. 226, note.



remedy thus allowed is called an action for mesne profits; that is, for the value of the premises during the period in which the plaintiff has been kept out of possession by the defendant. The plaintiff is also entitled to recover for all wrongful entries upon and damages done to his property in the mean time.<sup>1</sup> For example: The defendant enters upon premises of the plaintiff, of which the plaintiff has been dis-seised, and removes buildings therefrom. The plaintiff subsequently re-enters, and then brings suit for damages done to his property. He is entitled to recover.<sup>2</sup>

471. There is conflict of authority in regard to the existence in the disseisee of a right of action for mesne profits against one who, before the plaintiff's entry, had succeeded the disseisor by descent or purchase; that is, in the language of the law, against a stranger. On the one hand, it is said that to take a supposed title from another cannot be a trespass, and therefore mesne profits arising during the latter's occupation cannot be recovered of him.<sup>3</sup> On the other hand, the apparent injustice of this doctrine towards the owner has been urged, and the contrary conclusion reached.<sup>4</sup>

472. Between the extremes of these rulings however there is an important class of cases in this country, in regard to which there is little conflict. These are cases in which the defendant claims under one who has

<sup>1</sup> Liford's Case, 11 Coke, 46, 51. As to cases between landlord and tenant see (under statute) *Smith v. Tett*, 9 Ex. 307; *Doe v. Harlow*, 12 Ad. & E. 40; *Doe v. Challis*, 17 Q. B. 166; *Pearse v. Coker*, L. R. 4 Ex. 92. Mesne profits may now be had in a suit to recover the land. See ante, p. 224.

<sup>2</sup> *Dewey v. Osborn*, 4 Cowen, 329. This case shows also that the party on re-entry is in a position to sue for every entry upon his lands made without authority.

<sup>3</sup> Liford's Case, 11 Coke, 46, 51; *Barnett v. Guildford*, 11 Ex. 19, 30; *Case v. De Goes*, 3 Caines, 261, 263; *Van Brunt v. Schenck*, 10 Johns. 377, 385; *Dewey v. Osborn*, 4 Cowen, 329, 338.

<sup>4</sup> *Holcomb v. Rawlyns*, 2 Cro. Eliz. 540 (decided before Liford's Case); s. c. L. C. Torts, 363; *Morgan v. Varick*, 8 Wend. 587.

been let into possession under legal process. In cases of this kind it has been held that the defendant is not liable for mesne profits; and it seems just, as well as conformable to the doctrine of trespass upon lands, that one who has obtained possession under the disseisor by process of law should be presumed to be rightfully possessed while the process (and the possession by virtue of it) continues in force. For example: The defendant enters and occupies land of the plaintiff under a writ of possession, executed against one who had wrongfully disseised the plaintiff. The writ is afterwards set aside, and the plaintiff resumes possession. The defendant is not liable for the profits consumed during his occupancy.<sup>1</sup> Again: The defendant enters and takes possession of the plaintiff's land under a license from one who has been put into possession against a wrongdoer under a writ of restitution, which writ is afterwards quashed. The defendant is not liable for the mesne profits.<sup>2</sup>

473. It would seem also that purchasers, third persons, under judicial sales, should stand in a like situation; for, though they do not acquire title from parties let Entry under into possession under legal process, they take judicial sale. through the sheriff, who may reasonably be presumed to have authority to sell. And there is judicial authority for this view.<sup>3</sup> It would (probably) be otherwise if the purchaser should be the person who had instituted the invalid proceedings under which he was let into possession.<sup>4</sup>

474. The non-liability of the purchaser or heir extends however only to profits consumed by him. If such person sow the land, or cut down trees, or grass, or Extent of crops, and sever and carry them away, or sell them liability. to another, the disseisee, after regress, may take the things severed wherever he can find them, or, if he cannot find them, recover their value of the person lately in possession. The

<sup>1</sup> *Bacon v. Sheppard*, 6 Halst. 197, following *Menvil's Case*, 13 Coke, 19, 21.

<sup>2</sup> *Case v. De Goes*, 3 Caines, 361, following *Menvil's Case*, supra.

<sup>3</sup> *Dabney v. Manning*, 3 Ohio, 321.

<sup>4</sup> See further *L. C. Torts*, 362-366.

regress of the disseisee has relation to the beginning of the last occupation, and the title to the things severed is therefore in him, which title the carrying away and disposing of cannot divest.<sup>1</sup>

### § 3. OF WHAT CONSTITUTES A TRESPASS TO PROPERTY.

**475.** The gist of an action for trespass to land consists in the wrongful entry upon it, and so in interfering with the owner's (or tenant's) right of entire possession. **Damage not necessary.** Any entry upon land in the rightful possession of another, without license or permission, is a breach of duty to the possessor; and this too though the land be unenclosed. It follows that an action is maintainable for such an entry, though it be attended with no damage to the possessor. For example: The defendant without permission enters upon unenclosed land in the lawful possession of the plaintiff, with a surveyor and chain-carriers, and actually surveys part of it, but without doing any damage. The act is a breach of duty to the plaintiff, and the defendant is liable at least to nominal damages.<sup>2</sup>

**476.** The act is a breach of duty (though not in strict technical sense a trespass) even if the close entered be a private way, if only the plaintiff has a right of passage **Easement interrupted.** along or across it; it matters not that the plaintiff has no right to the soil.<sup>3</sup> For example: The defendant deposits articles at various times in a passageway to the use of which he has no right, and the plaintiff has a right, though the ownership of the soil is in another. The defendant is liable; though he removes the articles in every

<sup>1</sup> See *Liford's Case*, *supra*. But of course if the owner take away the things severed, the defendant can recoup their value in trespass for the mesne profits. *Id.*

<sup>2</sup> *Dougherty v. Stepp*, 1 Dev. & B. 371; *Hobson v. Todd*, 4 T. R. 71, 74. Buller, J.: 'The right has been injured.' Should the defendant repeat the offence, he may be made to smart for it in damages. *Williams v. Esling*, 4 Barr, 486.

<sup>3</sup> The action under the old system was 'case,' not trespass. See p. 244 (3).

instance before the plaintiff desires to pass out, and never in fact hinders the plaintiff in entering or in going out of the passage.<sup>1</sup>

477. A close is deemed to have been broken and entered even though the act was not in fact committed within it, but only against its bounds. To bring anything against such bounds without permission is a trespass. For example: The defendant, without permission, drives nails into the outer wall of the plaintiff's building, which stands upon the line of the plaintiff's premises. This is a breach of duty, for which the defendant is liable in damages.<sup>2</sup> Again: The defendant heaps up dirt close to the plaintiff's boundary wall, and the dirt, of itself, falls against the wall. This is a trespass.<sup>3</sup>

Trespass to  
bounds of a  
close.

478. An entry upon land, or a taking of goods, is justifiable when effected either (1) by license or consent of the party, or (2) by license of the law; a license being a mere permission to do what otherwise would be unlawful, and not a property right. The term 'license or consent of the party,' as here used, has reference to cases in which there is nothing beyond an actual consent, either in answer to a request for permission, or by specific or general invitation by the possessor; as e. g. in the case of a shopkeeper. Cases of this kind sufficiently explain themselves, and need not be dwelt upon. The term 'license of the law' has reference to cases in which a permission is given regardless of the will of the owner or occupant, including cases in which, in point of fact, there may at the same time be a license of the party, as for instance the case of an innkeeper who both invites and, generally speaking, must receive guests; enough that the license is paramount to the will of such person.

Justification  
of entry or  
taking goods:  
license.

479. In cases of the first kind the license is revocable in

<sup>1</sup> Williams v. Esling, 4 Barr, 486; Cases, 277.

<sup>2</sup> Lawrence v. Obee, 1 Stark. 22.

<sup>3</sup> Gregory v. Piper, 9 B. & C. 591.

respect of future acts, though it be made by contract, unless it is 'coupled with an interest;' the licensor may  
 License coupled with an interest. be liable for breach of contract, and yet revoke the license, so as to take away the licensee's permission.<sup>1</sup> A license is 'coupled with an interest' when it comprises or is connected with a grant.<sup>2</sup>

480. The second kind needs some special explanation. The law licenses an entry upon the land of another, or the taking possession of another's goods, in many cases; and in these the license cannot be revoked by the party affected. The first in importance of such cases is where the law has commanded the entry or the taking possession; the entry and levy of a sheriff by virtue of a valid precept being the chief example. In such cases reasonable force may be used to effect an entrance; though an entrance to an occupied dwelling-house cannot be forced, except for the purpose of serving criminal process.<sup>3</sup> In cases in which the license of the law is only implied, forcible entry can seldom be made, except in the case of an owner of land entitled to take actual possession.<sup>4</sup> That is to say, apart from the exceptional cases, the license appears to be conditional; the entry may be made, provided that it can be made without breach of the peace.<sup>5</sup> The following are cases of the kind: —

<sup>1</sup> *Wood v. Leadbitter*, 13 M. & W. 838; *Hyde v. Graham*, 1 H. & C. 593. But the licensee may sometimes be entitled to an injunction against the revocation. *Frogley v. Lovelace*, Johns. 333.

<sup>2</sup> *Wood v. Leadbitter*, *supra*, at p. 844.

<sup>3</sup> *Swain v. Mizner*, 8 Gray, 182; *Isley v. Nichols*, 12 Pick. 270; *Bailey v. Wright*, 39 Mich. 96; *People v. Hubbard*, 24 Wend. 369. Great exigency affecting the public, such as an extensive conflagration, would probably make another exception.

<sup>4</sup> *Sampson v. Henry*, 19 Pick. 36; *Churchill v. Hulbert*, 110 Mass. 42.

<sup>5</sup> *Churchill v. Hulbert*, *supra*. See *Scribner v. Beach*, 4 Denio. 448, 451. There are statutes everywhere imposing penalties for forcible entry upon premises. But the question is, whether a person, having a license to enter, is liable not only for the penalties but also as a trespasser. It appears to be clear that if the person entering is owner of the land, and entitled to take possession, he is liable only to the penalties of the statute. *Sampson v. Henry*, *supra*; *Biddall v. Maitland*, 17 Ch. D.



481. One case is where an entry is made into an inn,<sup>1</sup> or perhaps into the coach of a common carrier of passengers. Such an entry is lawful if the party is in a fit condition to be received, paying in advance, and in the case of a passenger, showing a ticket,<sup>2</sup> when required.

Inns and  
coaches of  
common car-  
riers.

482. A second case is where the party in possession of land has bound himself by debt to another, without any stipulation in regard to the place of payment. In such a case, the creditor is allowed by law to enter his debtor's premises for the purpose of demanding payment.<sup>3</sup>

Entry by  
creditor.

483. A third of these cases is where the party in possession holds, as tenant, a piece of real property of another. In such a case, the law allows the latter to make an entry upon the land for the purpose of ascertaining whether his interests are properly regarded by the possessor. For example: The defendant leases land to the plaintiff, and subsequently enters to see if the latter has committed waste. This is no breach of duty to the plaintiff.<sup>4</sup>

Entry by  
landlord.

484. A fourth case is where goods have been placed upon a man's land under a tenancy at will, or where goods have been sold which lie upon the premises of the vendor. In the absence of any special agreement or general custom concerning the delivery of the goods, the owner may go upon the premises and take them.<sup>5</sup> For example: The plaintiff lets premises to the defendant at

Entry by  
buyer of  
goods.

174; *Edwick v. Hawkes*, 18 Ch. D. 199. If however he should commit an assault upon the occupant, that, not being necessary to his entry, would make him liable for *that* act. *Sampson v. Henry*, *supra*. To enter forcibly in most other cases would be a trespass, because it would be in violation of the condition annexed by law to the license. See *Churchill v. Hulbert*, *supra*; *Wheelden v. Lowell*, 50 Maine, 499.

<sup>1</sup> *Six Carpenters' Case*, 8 Coke, 146.

<sup>2</sup> See *Butler v. Manchester Ry. Co.*, 21 Q. B. Div. 207; *Shelton v. Lake Shore Ry. Co.*, 29 Ohio St. 214.

<sup>3</sup> *Black. Com.* iii. 212.

<sup>4</sup> *Id.*

<sup>5</sup> *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400; *McLeod v. Jones*, 105 Mass. 403 (sale of goods on vendor's land).



will, on the terms that the defendant shall have reasonable time to remove his goods, after notice to quit. The defendant enters accordingly after termination of the lease, to get his goods, against the plaintiff's refusal to allow him. This is no breach of duty.<sup>1</sup>

**485.** A fifth case is where the owner of land has wrongfully burdened another with the possession of his (the former's) goods. In such a case, the goods may be taken and put upon the owner's premises; and neither the taking of the goods nor the entry upon the owner's premises is unlawful. For example: The defendant takes an iron bar and sledge belonging to the plaintiff, and puts them upon the plaintiff's land; the plaintiff having first brought them upon the defendant's premises, and then, without permission, having left them there. The entry is lawful.<sup>2</sup>

**486.** A sixth case is where a man's goods, without his act, have got upon the land of another. In such a case, the owner of the goods may enter and take them. For example: The defendant enters upon the plaintiff's land to get apples, which, by the action of the wind, have been blown *over* the line, from the defendant's trees into the plaintiff's close. The defendant is not liable.<sup>3</sup> Again: The defendant enters upon the plaintiff's land to get his own goods which the plaintiff has wrongfully taken and put there. This is lawful;<sup>4</sup> though it would have been otherwise had the plaintiff come properly into possession of the goods.<sup>5</sup>

<sup>1</sup> *Cornish v. Stubbs*, *supra*.

<sup>2</sup> *Cole v. Maundy*, *Viner's Abr. Trespass*, 516. See other cases there referred to.

<sup>3</sup> *Millen v. Fawdry*, *Latch*, 119, 120. It would be otherwise if the defendant should shake the trees. *Bacon's Abr. Trespass*, F. The action of the wind would, it seems, be immaterial, if the branches *overhung* the plaintiff's land; for that would itself be a nuisance. *Comp. Penraddock's Case*, 5 *Coke*, 100 b. The defendant should be allowed to enter only when he is entirely in the right, as where the apples are blown over the fence into the plaintiff's grounds.

<sup>4</sup> *Viner's Abr. Trespass*, 1 (A); *L. C. Torts*, 382.

<sup>5</sup> *L. C. Torts*, 381.

487. A seventh case is where a person enters the premises of another to save life or to succor a beast in danger. Such an act is not a trespass; but it is said that the case **Entry to save life.** would be different if the entry was made to prevent

a person from stealing the owner's beast, or to prevent cattle from consuming his corn.<sup>1</sup> The distinction made between the cases is that in the former case the loss of the animal would be irremediable, that is, that particular animal (which might be very valuable) could not be replaced; while in the latter case, the animal might be recovered from the thief, or the corn replaced by purchase or by a new crop: all corn being substantially alike. The distinction however sounds mediæval.

488. An eighth case is where a man creates, or after notice continues, a nuisance upon his premises, to the peculiar injury of his neighbor. In such cases the latter may **Entry to abate a nuisance.** enter and abate the nuisance. For example: The defendant enters upon the plaintiff's premises, and removes the eaves of a shed, which overhang the defendant's land and in rainy weather drip upon his premises. This is no breach of duty to the plaintiff.<sup>2</sup>

489. A ninth case is where an entry has been made upon land of another by reason of necessity, without the fault of the person entering. Such an entry is justifiable. **Entry of necessity.** For example: The defendant runs into the plaintiff's premises to escape a savage animal, or the assault of a man in pursuit of him. The defendant is not liable.<sup>3</sup> Again: The defendant enters upon the plaintiff's premises to pass by a portion of the highway which at this point is wholly flooded, but without the act of the defendant. The entry is justifiable.<sup>4</sup>

490. It has already been seen that a trespass to property consists in an unlawful entry of land or taking of goods,<sup>5</sup> and

<sup>1</sup> Bacon, *ut supra*.

<sup>2</sup> *Penruddock's Case*, 5 Coke, 100 b; L. C. Torts, 383, where various distinctions as to such cases are mentioned.

<sup>3</sup> Year Book, 37 Hen. 6, p. 37, pl. 26.

<sup>4</sup> *Absor v. French*, 2 Show. 28.

<sup>5</sup> Where A's goods are unlawfully sold and delivered by B, must the former make demand for them before he can sue for the trespass? The

a trespass by imprisonment in an unlawful arrest. There is one case however in which, by reason of subsequent acts, a person may be treated as a trespasser notwithstanding the lawfulness of the entry or taking possession, or of the arrest; the result thus being to deprive the party of the justification of the lawfulness of the original act, and, by a fiction of law, to make him a trespasser *ab initio*. According to this fiction, one who has taken possession of goods, or entered upon land, by virtue of a license of the law, becomes a trespasser *ab initio* (notwithstanding the lawfulness of the levy or entry), where afterwards, while acting under the license, he commits an act which in itself amounts to a trespass.<sup>1</sup> For example: The defendant, a sheriff, remains an unreasonable length of time in the plaintiff's house in possession of goods taken by him in execution. He is a trespasser *ab initio*.<sup>2</sup>

491. But, in order to become a trespasser *ab initio*, the subsequent act must, it has been held, be a technical trespass, or at least show a purpose to make use of the license as a mere cover for a wrongful act. If this is not the case, — if the entry was in good faith, and the subsequent act was not a trespass, — the party is not to be treated as a trespasser from the beginning, though the act committed be wrongful and subject him to liability. For example: The defendant, an officer, enters upon the plaintiff's premises by virtue of a lawful writ, to make a levy for debt. While there, in the course of his business as an officer, he wrongfully extorts money from the plaintiff. He is not a trespasser from the beginning of his entry, though the extortion was a breach of duty for which he would be liable in damages; extortion not being a trespass.<sup>3</sup> Again: The defendant refuses

question is not so important now as formerly, for suit is more generally brought in such cases for conversion. See post, p. 263.

<sup>1</sup> Six Carpenters' Case, 8 Coke, 146; L. C. Torts, 386.

<sup>2</sup> Ash v. Dawnay, 8 Ex. 237; Rowley v. Rice, 11 Met. 337.

<sup>3</sup> Shorland v. Govett, 5 B. & C. 485. See Six Carpenters' Case, *supra*. But compare Holley v. Mix, 3 Wend. 350. If the entry under the writ was merely to cover the purpose to extort, there would probably be a

to drop a distress on the plaintiff's goods, upon due tender by the plaintiff of the rent due. The defendant is not a trespasser.<sup>1</sup>

492. These examples, on consideration, will show the importance of the doctrine of trespass ab initio. If the person's conduct make him obnoxious to this doctrine, it follows (probably) that all acts done, such as, in the case of an officer, levies made, intermediate the entry and the trespass, are void; since, his entry being a trespass, he could not, according to general principles of law, thereafter do an act against the will of the occupant which would be legal.<sup>2</sup> Besides, he would be liable for the entry as well as the after acts. The doctrine does not therefore concern the form of remedy alone.

Significance  
of trespass ab  
initio.

493. This doctrine of trespass ab initio applies however only against persons who have entered or taken goods by license of law. A person cannot treat as a trespasser from the beginning one to whom he has himself given permission to enter or take his goods, whatever be the nature of his subsequent acts.<sup>3</sup> For example: The defendant, by permission of the plaintiff's wife, enters the plaintiff's house in his absence, and while there wrongfully

Limitation of  
the doctrine.

trespass ab initio. Compare *Grainger v. Hill*, 4 Bing. N. C. 212, ante, pp. 113, 200. That, it seems, suggests the true distinction. *Six Carpenters' Case*, supra. See also *Commonwealth v. Rubin*, 165 Mass. 453, Holmes, J. The doctrine is applicable only to cases in which there has been an 'abuse of some special and particular authority given by law, as in the case of process. *Esty v. Wilmot*, 15 Gray, 168. The exercise of the power given is *conditional* upon keeping wholly within legal limits. *Id.*, Hoar, J.

<sup>1</sup> *West v. Nibbs*, 4 C. B. 172.

<sup>2</sup> Compare *Ilseley v. Nichols*, 12 Pick. 270, denying certain dicta of the books. *Ilseley v. Nichols* decides that a levy made by breaking open the outer door of an occupied dwelling-house (a house is a man's castle) is invalid, and the officer is liable for the value of the goods taken as well as for the unlawful entry. The same result should in principle follow if, by an act subsequent to the entry, he become a trespasser from the beginning.

<sup>3</sup> *Six Carpenters' Case*, supra; *Esty v. Wilmot*, 15 Gray, 168; *Allen v. Crofoot*, 5 Wend. 506.

gets possession of papers, and carries them away. This does not make him a trespasser *ab initio*.<sup>1</sup>

494. As where the entry was made in good faith the subsequent act must amount to a trespass, it becomes necessary to ascertain somewhat precisely the technical signification of that term. It is difficult to define a trespass, but the following will serve to indicate the proper meaning of the term: (1) Any wrongful intended contact with the person is a trespass. (2) Any wrongful entry upon the plaintiff's land or interference with the plaintiff's possession of personalty is a trespass. (3) Any wrongful act committed directly with force is a trespass, though no physical contact with the person of the plaintiff or with his property be produced; as in the case of an imprisonment without contact, or the firing a gun under the plaintiff's window, to alarm the inmates of his house. In cases like these, force is said to be implied. Upon the same ground, the seduction of the plaintiff's wife, daughter, or servant might perhaps be considered as a trespass, and the act was formerly so treated by the courts;<sup>2</sup> the consent given was not the plaintiff's consent. But the present view is different.<sup>3</sup>

495. On the other hand, (1) a mere non-feasance (that is, a pure omission) cannot be a trespass;<sup>4</sup> (2) nor can there be a trespass where the matter affected was not tangible, and hence could not be immediately injured by force, as in the case of an injury to reputation or health; (3) nor can there be a proper trespass where the right affected is incorporeal, as a right of common or way; (4) nor where the interest injured exists in reversion or remainder; (5) nor where there is no right of action immediate upon the act in question.<sup>5</sup>

<sup>1</sup> *Allen v. Crofoot*, 5 Wend. 506.

<sup>2</sup> *Tullidge v. Wade*, 3 Wils. 18; *Chitty, Pleading*, i. 126, 133.

<sup>3</sup> *Macfadzen v. Olivant*, 6 East, 387. *Chitty* prefers the old doctrine. *Pleading*, i. 133.

<sup>4</sup> *Six Carpenters' Case*, 8 Coke, 116.

<sup>5</sup> See *Chitty, Pleading*, i. 166. But quære whether the effect of the rule of trespass *ab initio* might not be had in some of these cases, as in the third and fourth?

496. Lastly, to constitute a trespass to property, the thing affected must be capable of ownership as property; and in some cases it must have been in the plaintiff's possession at the time. Wild animals, untamed, are deemed property only while in one's actual or constructive possession; upon effectual and final escape, they cease to be property so long as they are free. Any one may now kill or take them. Indeed a savage domestic animal straying at large, and dangerous, may be killed, though the owner be known to be in pursuit.<sup>1</sup>

Things which  
are not prop-  
erty.

497. A man may have property in a dog even though the animal may not have any certain pecuniary value.<sup>2</sup> The same is probably true of rare animals kept for study, for exhibition, for breeding, or even as pets.<sup>3</sup> No one therefore has a right to take these from the owner, or to keep them from him when taken up as strays,<sup>4</sup> or needlessly to kill them.<sup>5</sup> But there are circumstances when the law justifies the killing of another's animals; a man may not only protect himself or another from the attack of a beast, he may kill an animal, in some cases, which is doing mischief, as a dog which is biting or worrying his sheep or other valuable animals or fowls.<sup>6</sup> Indeed, a savage dog, suffered to run at large without a muzzle, and disposed to attack or snap at people, may be treated as a nuisance and killed by any one; and that too whether at the time the dog was doing harm or not.<sup>7</sup>

498. A man may however keep a ferocious dog as a watch over his premises, if properly secured; while the dog is in such a situation, no one may lawfully kill it, unless indeed

<sup>1</sup> Kent, Com. ii. 348, 349.

<sup>2</sup> *Dodson v. Meek*, 4 Dev. & B. 146; *Wheatly v. Harris*, 4 Sneed, 468.

<sup>3</sup> See *Amory v. Flynn*, 10 Johns. 102, as to wild animals tamed.

<sup>4</sup> *Id.*

<sup>5</sup> *Dodson v. Meek* and *Wheatly v. Harris*, *supra*.

<sup>6</sup> *King v. Kline*, 6 Barr, 318; *Woolf v. Chalker*, 31 Conn. 121; *Brown v. Hoburger*, 52 Barb. 15.

<sup>7</sup> *Putnam v. Payne*, 13 Johns. 312; *Maxwell v. Palmerston*, 21 Wend. 407; *Brown v. Carpenter*, 26 Vt. 638.



it is then making an attack upon man or beast.<sup>1</sup> It would doubtless be lawful to kill the dog to save the life even of a burglar.

499. A word may be added in regard to trespassing animals. The law is very plain and natural; trespassing will seldom justify killing or maiming,<sup>2</sup> or even detaining upon a claim for anything more than reimbursement of necessary expenses and payment of damage done. And if detained, the animals must be taken care of and properly treated.<sup>3</sup> On the other hand, if driven away, that must be done without unnecessary violence; such violence would be a trespass. For example: The defendant, finding the plaintiff's horse straying upon his premises, sets a savage dog upon it, and the horse is seriously hurt. The defendant is liable in damages.<sup>4</sup>

<sup>1</sup> See *Perry v. Phipps*, 10 Ired. 259.

<sup>2</sup> See *Aldrich v. Wright*, 53 N. H. 398, an important case, in which a killing was held proper.

<sup>3</sup> *Murgoo v. Cogswell*, 1 E. D. Smith, 359.

<sup>4</sup> *Amick v. O'Hara*, 6 Blackf. 258.

## CHAPTER XI.

### CONVERSION.

*Statement of the duty.* A owes to B the duty not to exercise dominion (1) over B's general property in personal chattels; (2) over B's special property in the like things.

By 'general property' is commonly meant the ownership of property, subject, it may be, to a special property for a time in another.

By 'special property' is meant a right of possession coupled with possession; the right being general, as in the case of a lien creditor, or limited, as in the case of a finder.

By 'bare possession' merely is commonly meant a mere custody ('detention') or a possession unlawfully obtained.

The action for converting goods to one's own use has always been called 'trover,' a term meaning 'to find,' which was used in the old precedents of declaration; the plaintiff, by a fiction, alleging that he had lost and the defendant had *found* and converted to his own use the chattel in question. This fiction was resorted to in cases of bailment or the like, to avoid the objection that the defendant had received the goods from the hand of the plaintiff.<sup>1</sup> The judges received the allegation accordingly, and did not require proof of it; proof of the conversion therefore was enough.

The action of 'trover' is an action to recover (not specific

<sup>1</sup> According to the old theory the wrong must have been done to the plaintiff's possession, and hence it was fatal to any action of the kind that the plaintiff had delivered possession to the defendant. If, in respect of possession, the conversion had originally been deemed enough, there would have been no need of the invention of the fiction of loss and finding.

Such common cases as actions for the taking of straying cattle may have suggested the idea of the fiction. See L. C. Torts, 422.

articles, but) damages for the conversion of chattels personal, to the value of the interest converted.

By an 'act of dominion' is meant an act of, or tantamount to, ownership.

The action of detinue is not much used in modern times. Its object is to recover chattels in specie, or damages for their non-return if they cannot be had, and damages for the wrongful detention. It has been superseded largely by the statutory action of replevin and by trover. The principles set forth in this chapter apply, generally speaking, to all three of these actions.

As in trespass, so in trover, detinue, and replevin, the thing alleged to have been converted must be capable of ownership as property.<sup>1</sup>

### § 1. WHAT MUST BE PROVED.

500. The plaintiff is entitled to recover by proving that the defendant took and converted to his own use goods of which the plaintiff was in possession or entitled to take possession at the time of the conversion or because of that act.

### § 2. OF POSSESSION.

501. The possession of a chattel personal, that is, of a movable article, or a right to take possession thereof, is necessary to support an action for conversion, just as it is to support an action for trespass. The plaintiff fails in trover if it appear that he has never acquired a right of possession, or if he has, that he has parted with it, and has not before suit become re-invested with the same. For example: The plaintiff is the purchaser of goods, which however remain in the seller's possession subject to a lien for the purchase price. The defendant, without authority, removes the goods from the seller's possession, doing no permanent injury to them. This is no breach of duty to the plaintiff.<sup>2</sup> Again: The defendant, a sheriff, wrongfully levies upon goods of the plaintiff in the

Possession  
necessary to  
action for con-  
version.

<sup>1</sup> See ante, p. 245.

<sup>2</sup> Lord v. Price, L. R. 9 Ex. 54.

hands of a lessee of the property, and carries the goods away. The plaintiff cannot treat the act as a conversion (though the tenant could), since the plaintiff was not entitled to the possession of the property.<sup>1</sup>

502. On the other hand, the right to the possession of the chattels is sufficient to enable the general owner to sue for a conversion thereof, though he may not have the actual possession at the time of the wrongful act; because, as was stated in the preceding chapter, the right to take possession of goods draws possession in law. For example: The defendant buys and takes away a chattel belonging to the plaintiff from A, who had no right to sell it. The plaintiff, being the owner, is deemed to have been in possession of the chattel at the time of the conversion by the defendant.<sup>2</sup>

503. A person having 'special property' in goods, with general right of possession, can maintain an action for conversion against all persons who may wrongfully exercise dominion over them, though the act be done by command of the owner of the goods. For example: The defendant takes a horse out of the possession of the plaintiff, the plaintiff having a lien upon the animal. The defendant acts by direction of the owner, but without other authority. He is liable for conversion of the horse.<sup>3</sup>

504. It follows that a person having a special property in goods, together with general right of possession of them, may maintain an action against the owner himself for any unpermitted disturbance or refusal of his possession; since, if the owner cannot give an authority to another to take the goods, he cannot take them himself. For example: The defendant, owner of a title-deed, in the possession of the

<sup>1</sup> *Gordon v. Harper*, 7 T. R. 9. See *Farrant v. Thompson*, 5 B. & Ald. 826; ante, p. 230.

<sup>2</sup> *Hyde v. Noble*, 13 N. H. 494; *Clark v. Rideout*, 39 N. H. 238; *Carter v. Kingman*, 103 Mass. 517.

<sup>3</sup> See *Outcalt v. Durling*, 1 Dutch. 443. The form of action in this case was trespass, but it might as well have been trover. The injured party could sue in either form in such cases.

plaintiff under a temporary right to hold it, takes it by permission of the plaintiff for a particular purpose, and then, during the continuance of the plaintiff's right to hold it, refuses to redeliver it. The defendant has violated his duty to the plaintiff, and is liable for conversion.<sup>1</sup>

**505.** One who has possession of chattels, though without a right to hold them against the owner, is also protected against all persons having neither a right of property nor of possession. The mere fact that the possessor of goods has no right to hold them against persons having a general or higher special property in the goods, gives no privilege to a stranger to interfere with the party's possession. So to interfere would be a breach of duty to the possessor which would render the person interfering liable for the value of the goods. For example: The defendant, a stranger, refuses to return to the plaintiff a jewel, which the latter has found and shown to the defendant. The defendant's act is a breach of duty to the plaintiff, and he is liable for the value of the jewel.<sup>2</sup>

**506.** It would be different however if the defendant acted under express authority of the owner, or of one entitled to the possession of the property. But it is laid down that the defendant could not set up the rights of a third person (called the 'jus tertii') without authority from the latter.<sup>3</sup> That is, the defendant can deny the plaintiff's right only by showing a better right in himself.<sup>4</sup>

**507.** The finding of a chattel does not however in all cases give a right to hold the article against all persons having no

<sup>1</sup> *Roberts v. Wyatt*, 2 Taunt. 268.

<sup>2</sup> *Armory v. Delamirie*, 1 Strange, 505; Cases, 288.

<sup>3</sup> *Rogers v. Arnold*, 12 Wend. 30 (suit to recover the chattels specifically); *Jefferies v. Great Western Ry. Co.*, 5 El. & B. 802; *Cheesman v. Exall*, 6 Ex. 341; L. C. Torts, 426. Does this mean that possession in itself, however obtained, will be protected, — that it cannot be shown e.g. that the plaintiff stole the property? See ante, p. 227, note.

<sup>4</sup> *Hubbard v. Lyman*, 8 Allen, 520; *Landon v. Emmons*, 97 Mass. 37.

right of property in it; though the finding and taking possession were not unlawful as against the loser.

**Finding.**

The chattel may be found upon the premises of another, in such a situation as to indicate that it was voluntarily put in possession of the owner of the premises. When this is the case, the possession of the article is deemed to be in the occupant of the premises, and not in the finder. The former can therefore maintain an action for conversion against the latter, should he refuse to surrender to him the chattel. For example: The defendant, a barber, receives from the plaintiff, a customer in his shop, a pocket-book containing money, which the plaintiff has discovered lying upon a table in the defendant's shop. The plaintiff, in handing the pocket-book to the defendant, tells him to keep it until he can discover the owner, and then return it to the loser. No one having called for the article, the plaintiff claims it, and the defendant refuses to give it to him. This is not a breach of duty to the plaintiff, since the fact that the pocket-book was left upon the defendant's table indicates that the owner put it there by intention, and so put it into the defendant's keeping or possession.<sup>1</sup>

508. If however the chattel be found in a position which indicates that it could not have been purposely put there, but must have been unintentionally parted with, and so truly lost the moment it escaped the owner, it does not fall into the keeping or possession of the occupant of the premises unless he (or his servant) first discover it there. If another first find it, the possession, as between himself and the occupant, is in him, the finder.<sup>2</sup> For example: The defendant, a shop-keeper, receives from the plaintiff a parcel, containing bank-notes, which the latter has picked up from the *floor* of the defendant's shop; the plaintiff, on handing the parcel to the defendant, telling him to keep the same till the owner claims it. The defendant advertises the parcel, but no one claims it, and three years having elapsed, the plaintiff re-

<sup>1</sup> *McAvoy v. Medina*, 11 Allen, 548.

<sup>2</sup> *South Staffordshire Water Co. v. Sharman*, 1896, 2 Q. B. 44; *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75.



quests the defendant to return to him the bills, at the same time tendering the cost of advertising, and even offering an indemnity. The defendant refuses. This is a breach of duty to the plaintiff, and the defendant is liable to him for conversion of the parcel.<sup>1</sup>

**Possession here has the same meaning as in trespass.** 509. The term 'possession' has the same meaning here, and indeed everywhere in the law of torts, that it has in cases of trespass.<sup>2</sup> Thus, a servant can, it seems, only hold; the possession is the master's. For example: The defendant takes goods out of the hands of the plaintiff, a sheriff's deputy, without authority. The act is deemed not a breach of duty to the plaintiff, since he is but a servant, and so holds not in his own right;<sup>3</sup> though it would be otherwise in regard to the sheriff.

### § 3. OF WHAT CONSTITUTES CONVERSION.

**Usurpation of ownership.** 510. It has been seen that conversion consists in the exercise of an act of dominion over the movables of another; that is, it is a usurpation of ownership. It matters not whether this was done with or without knowledge of the true state of the title, as will be seen; every man acts at his peril in exercising acts of dominion over property.<sup>4</sup> The distinction between trespass and conversion consists in this, that trespass is an unlawful taking, as for the mere sake of removing the property, while conversion is an unlawful taking or keeping in the exercise, legally considered, of the right of ownership.<sup>5</sup>

<sup>1</sup> *Bridges v. Hawkesworth*, supra.

<sup>2</sup> Ante, p. 227. The meaning there ascribed to the term is intended to be of the widest application, where the possession is real.

<sup>3</sup> *Hampton v. Brown*, 13 Ired. 18; ante, p. 228.

<sup>4</sup> See a qualification stated in *Hollins v. Fowler*, L. R. 7 H. L. 757, 768, Lord Blackburn, in regard to dealing with goods at the request of a person having actual custody of them, in the bona fide belief that such person is owner, or has the owner's authority.

<sup>5</sup> See *Bushel v. Miller*, 1 Strange, 129; *Fouldes v. Willoughby*, 8 M. & W. 540, 551, Rolfe, B.

511. Acts of dominion appear in two forms: first, where the wrongdoer appropriates to himself the goods of another; secondly, where, without appropriating them to himself, he deprives the owner, or person having the superior right, of their use, by an act of ownership.

512. The most common illustration of an act of dominion in the first form is the case of a sale and delivery of goods, made without authority of the owner. Every sale without restriction by a person having no right to sell is a conversion, if followed by delivery,<sup>1</sup> and renders the vendor liable in an action of trover.<sup>2</sup> For example: The defendant, an officer, levies upon goods as the property of a third person, some of which belong to the plaintiff, takes them away, after being informed of the plaintiff's claim, and sells the whole. This is a conversion of the plaintiff's goods; though it would have been otherwise had the goods been mixed by the plaintiff with those of the third person,<sup>3</sup> and a separation not offered by the plaintiff.<sup>4</sup>

Sale and delivery without authority.

513. The same consequence follows where, having authority to make a sale, the party selling transgresses his right; since to do so is to assert that he may sell according to his own will, and that is to exclude the rights of all others. For example: the defendant, an officer, makes, unnecessarily, an excessive levy upon the plaintiff's goods, under a valid writ, and sells them. This is a conversion, since it is done in disregard of the defendant's authority, and according to the party's own will.<sup>5</sup>

514. This principle that the sale of property with delivery is an act of dominion so as to render the seller liable for con-

<sup>1</sup> See *Consolidated Co. v. Curtis*, 1892, 1 Q. B. 495, 498.

<sup>2</sup> Quære, whether a demand would be necessary? See post, p. 263.

<sup>3</sup> *Gilman v. Hill*, 36 N. H. 311.

<sup>4</sup> See *Kent*, Com. ii. 365.

<sup>5</sup> *Aldred v. Constable*, 6 Q. B. 370, 381. See *Sommer v. Wilt*, 4 Serg. & R. 19; *Stewart v. Cole*, 46 Ala. 646. So to pledge the goods of another without authority. *Carpenter v. Hale*, 8 Gray, 157.

version if he had no right to sell as he did, applies equally whether the vendor knew or did not know the true state of the title, or the actual limit of his authority. Liability for converting the goods of another to one's own use does not depend upon the intent of the party exercising the act of dominion. For example: The defendant sells and delivers a horse of the plaintiff to a third person, the defendant having bought the animal from one who had no title to it, though the defendant supposed the contrary, and supposed himself to be owner of the horse at the time of the sale in question. The defendant is liable for conversion.<sup>1</sup>

**515.** Where the purchaser's vendor had acquired his supposed title from the plaintiff by means of a sale effected by false, or even by fraudulent, representations, the case would be different. Fraud of this character renders the sale voidable merely, not void; the consequence of which is, that the defrauded party has a right to rescind the sale only so long as the property remains in the hands of the buyer from himself, or of any one claiming under him who is not a purchaser for value without notice.<sup>2</sup> Inasmuch as the buyer, notwithstanding his fraud, acquired the title to the goods, he can convey that title; and more, he can convey a better right than he had himself, provided he sell to a purchaser for value without notice.

**516.** Hence, not only would such purchaser be free from liability in refusing to return the goods to the defrauded party, but should that party obtain possession of them and refuse to deliver them to the purchaser from the intermediate seller, he (the defrauded party) would himself be liable in trover. For example: The defendants, having previously been owners of a quantity of iron, sell the same to P, who gives them a fraudulent draft (supposed by the defendants to

<sup>1</sup> Harris v. Saunders, 2 Strobb. Eq. 370, note; Carter v. Kingman, 103 Mass. 517. See McCombie v. Davies, 6 East, 538; Hilbery v. Hatton, 33 L. J. Ex. 190; Fowler v. Hollins, L. R. 7 Q. B. 616; s. c. 7 H. L. 757.

<sup>2</sup> Clough v. Northwestern Ry. Co., L. R. 7 Ex. 26.

be good) for the amount due for the property. P then sells the iron to the plaintiff, who buys for value, and without notice of the fraud. Subsequently, the defendants discover the fraud, and send their servant to take away the iron, now lying in port in a lighter alongside the plaintiff's wharf. The servant takes away the lighter and brings the iron therein to the defendants. The plaintiff has acquired a good title to the iron, and the defendants are guilty of a conversion.<sup>1</sup>

517. There are other cases in which a person may by purchase for value and without notice acquire a better right than his vendor had. A purchaser of goods from one who has by the terms of sale reserved the right to buy back the property within a certain time, acquires (or may by such a transaction acquire) the title to the property, and, having a good title, he may convey the same to one who purchases for value and without notice, so as to cut off the original owner's right to repurchase. The consequence is, that the last purchaser is not guilty of a conversion by refusing to let the original owner have the goods upon a tender by him of the amount he was to pay for them, though made within the time agreed upon between him and his buyer. The case would be different however in regard to the buyer from the original owner. His act in making the sale would indeed be lawful against the seller, if the seller should never offer to repurchase; but if the seller should offer to repurchase, and tender the price, his purchaser would be bound to return to him the goods, and, in case of failure, would be liable according to the terms of the contract.

518. If however the sale were upon condition that the title should not pass until the performance of some condition, the party, not having acquired the title, could not convey it; and an attempt to do so by a sale and delivery would, by the better rule, subject the buyer to liability for conversion. For example: The defendants purchase furniture from W, who had taken possession of the

Conditional  
sale.

<sup>1</sup> *White v. Garden*, 10 C. B. 919. See for the converse case *Cundy v. Lindsay*, 3 App. Cas. 459.

same upon an agreement that he should keep it six months, and if within that time he should pay a certain sum for it, it should be his; otherwise, he was to pay twenty-five per cent of the price for the use. The sale to the defendants is made shortly after W takes possession of the furniture and before payment for it. A refusal by the defendants to restore the property to the plaintiff is a breach of duty to him, and makes them liable for the value of the furniture.<sup>1</sup>

519. According to recent authorities, the holder of a pledge or pawn has such an interest in the chattel that he can dispose of the same by sale or repledge without subjecting the purchaser or repledgee to *trover*, and without subjecting himself thereto, except in either case upon a failure to produce the pledge or pawn upon tender of the debt to secure which the chattel was given. For example: The defendant has taken in pledge from S certain bonds, which the plaintiff had pledged to S for the security of a debt smaller than the amount of the debt of S to the defendant; the repledge being made before the maturity of the original debt,<sup>2</sup> and before payment or tender thereof. The refusal of the defendant to return the bonds to the plaintiff except on tender to the defendant of the amount due to S is not a *conversion* by the defendant; nor would the act of S amount to a conversion, unless upon tender of the debt due to him he should fail to return the bonds.<sup>3</sup>

520. One who has a special property in goods may or may not be able to dispose of his interest therein, according to the

<sup>1</sup> Sargent *v.* Gile, 8 N. H. 325, denying Vincent *v.* Cornell, 13 Pick. 294. According to the latter case, the conditional buyer would, by the sale, transfer his own right, such as it was. See Coggill *v.* Hartford R. Co., 3 Gray, 545; Deshon *v.* Bigelow, 8 Gray, 159.

<sup>2</sup> That is, while the bonds were still subject to redemption by the plaintiff.

<sup>3</sup> Donald *v.* Suckling, L. R. 1 Q. B. 585; Cases 294. To pledge, without authority, another's property held in simple bailment would be a very different thing. Carpenter *v.* Hale, 8 Gray, 158, *infra*, p. 259. Note also the distinction in Post *v.* Union Bank, 42 N. E. Rep. 976 (Ill.); Carpenter *v.* Dresser, 72 Maine, 377, *in case*.

nature of his interest. Not every special property is alienable. In many cases of bailment, the special objects to be effected forbid that the bailee should have an assignable interest. Such is the case

Special property: alienation.

(1) where the bailment is made upon a trust in the personal skill, knowledge, or efficiency of the bailee. Such is the case (2) where the bailee has a mere lien upon the goods intrusted to him. And such is the case (3) where the bailment is at the bailor's will. In any of these cases, any attempt by the bailee to assign his interest in the property, followed by delivery of possession, puts an end at once to the bailment. The consequence is, that the assignee acquires no title or right, and becomes liable on refusing to surrender the goods to the owner, even if not by merely taking them.

521. There is however a large class of bailments where the trust is accompanied with other incidents than those pertaining to a simple bailment, and where there is no element of personal trust, and none of the characteristics of an estate at will; and in this class it is clear that the bailee has an assignable interest. There can be no conversion therefore in the act of transferring such an interest merely, provided the assignee claims only the rights of the assignor; because the latter, having exercised no act of dominion over the property, but having dealt simply with his own interest, did not reinvest the owner with a right of possession. An attempt by the bailee to dispose of the goods absolutely however would be different, if followed by a delivery of them. For though a bailee could not, without fault on the part of the owner (by holding him out as having a right to sell absolutely), dispose of anything beyond his own interest, the attempt to do so, followed by the overt act, would be to exercise dominion over the goods.<sup>1</sup>

522. It is not always necessary that there should be an appropriation of the entire property held in order to effect a

<sup>1</sup> See ante, p. 253; *Lancashire Wagon Co. v. Fitzhugh*, 6 H. & N. 502; *Cooper v. Willomatt*, 1 C. B. 672.



conversion of the whole. If the part appropriated be necessary to the use of the rest in the purpose to which the whole was to be put, as by rendering an intended sale impracticable except at a sacrifice, the part appropriation, if wrongful, *may*, it seems, be a conversion of the whole. For example: The defendant, a bailee by the plaintiff of wine in casks for sale by the cask, consumes part of the wine in one cask. This may (probably) be treated as a conversion of all the wine in that cask.<sup>1</sup> Again: The defendant finds a raft of timber belonging to the plaintiff lodged on a sandbar in a stream, takes possession of it, hires a man to assist him in removing part of it, and sells the rest to him, reserving the part removed. This may be treated as a conversion of the whole raft.<sup>2</sup>

523. It appears to be immaterial to the plaintiff's right of recovery for the whole, that what remains is still in itself as good as if there had been no severance; the plaintiff has the right to the benefit to be obtained from it in its entirety, where that is a special benefit. This principle would apply to cases where separate articles are delivered under one entire contract of bailment or lease, even though the articles be separately enumerated and valued. The bailment or lease is still indivisible in contemplation of law, and conversion of part may be conversion of the whole.<sup>3</sup>

524. If however separate articles be severally bailed or leased, by distinct contracts, though all be delivered and bargained for at the same time, the rule of law is (probably) different; a conversion of one of the articles or parts would not in such a case operate as a conversion of the whole.

525. If the owner of goods stand by and permit them, without objection, to be sold as the property of another, the purchaser acquires a good title, and is not liable 'Standing by.' to the owner for a refusal to deliver them to

<sup>1</sup> Philpott v. Kelley, 3 Ad. & E. 106, *semble*. The case was not so strong as the facts put in the example. See Clendon v. Dinneford, 5 Car. & P. 13; Gentry v. Madden, 3 Pike, 127.

<sup>2</sup> Gentry v. Madden, 3 Pike, 127.

<sup>3</sup> See Clendon v. Dinneford, 5 Car. & P. 13; Gentry v. Madden, *supra*.

him.<sup>1</sup> For example: The defendant purchases machinery of M, the legal title to which at the time of the sale is in the plaintiffs. The machinery is sold under a levy of execution against M, and the plaintiffs, though having notice of the levy, and having repeatedly conversed about it, before the sale, with the attorney of the party who made the levy, never laid any claim to the property until after the sale. The defendant's refusal to surrender the machinery to the plaintiff is not a breach of duty.<sup>2</sup>

526. Appropriating an article held in bailment to a use not contemplated at the time of the contract of bailment and not authorized by law, may constitute conversion. **Unauthorized use, etc.** For example: The defendant hires of the plaintiff a horse to ride to York, and rides it beyond York to Carlisle. This is a conversion of the animal, entitling the plaintiff, on return of the property, at least to nominal damages, and to actual damages if any loss be in fact sustained by reason of the act.<sup>3</sup> Again: The defendant lends money to E, taking from him by way of security a quantity of leather, which had been placed in E's hands by the plaintiff to be made up into boots, on hire. The defendant refuses to surrender the leather to the plaintiff. He is guilty of conversion.<sup>4</sup> Again: The defendant receives from the plaintiff shares of stock to be sold on commission. Instead of selling, the defendant exchanges the stock for other property. This is a conversion.<sup>5</sup>

527. It has sometimes been supposed that there can be no right of action for conversion in such cases, unless the

<sup>1</sup> *Pickard v. Sears*, 6 Ad. & E. 469; *Stephens v. Baird*, 9 Cowen, 274; *Dezell v. Odell*, 3 Hill, 215.

<sup>2</sup> *Pickard v. Sears*, 2 Ad. & E. 469.

<sup>3</sup> *Isaack v. Clark*, 2 Bulst. 306; *Perham v. Coney*, 117 Mass. 102.

<sup>4</sup> *Carpenter v. Hale*, 8 Gray, 157.

<sup>5</sup> *Haas v. Damon*, 9 Iowa, 589. The buyer would not be liable if the act was within the general scope of the agent's authority, and without notice of the breach of duty.

chattel was injured in the misappropriation.<sup>1</sup> But there is ground for doubting the correctness of this doctrine. The foundation of the action is the usurpation of the owner's right of property. It is true, the plaintiff in trover seeks to recover the value of the thing converted, but if he has received it back, or possibly if it has been tendered back in proper condition,<sup>2</sup> he will be allowed to recover no more (beyond nominal damages) than the amount of his loss.<sup>3</sup> But conversion itself is a cause of action; it is not necessary to prove special damage.

**528.** In all the foregoing cases, it will be observed that there is something more than an assertion, by word of mouth, of dominion over the chattel. An assertion alone, **Assertion of authority not enough.** not followed by any act in pursuance of it, such as a refusal to surrender the chattel to the person entitled to possession, would not amount to a conversion. There must be some unauthorized interference with the plaintiff's right of possession. Even an attempted exercise of dominion, without right, appears to be insufficient to constitute a conversion, if the owner's right was not in fact in-

<sup>1</sup> *Johnson v. Weedman*, 4 Scam. 495; *Harvey v. Epes*, 12 Gratt. 153. In the first of these cases a horse which the defendant had converted died on his hands, directly after but not in consequence of the conversion. It was held that the owner had no cause of action. The plaintiff was not entitled to recover the value of the horse, but he had a cause of action, it should seem.

<sup>2</sup> There is much doubt of the right to tender back the converted chattel, though it has not been injured, especially if the conversion was 'wilful.' See *Hart v. Skinner*, 16 Vt. 138; *Green v. Sperry*, id. 390. But see *Delano v. Curtis*, 7 Allen, 470, 475. Further see *Yale v. Saunders*, 16 Vt. 243; *Stephens v. Koonce*, 103 N. Car. 266. The true view of the case appears to be that the party wronged has an election whether to treat the wrong as a conversion or not, and the question then is whether he has exercised his election.

<sup>3</sup> *Fisher v. Prince*, 3 Burr. 1363; *Earle v. Holderness*, 4 Bing. 462; *Cook v. Hartle*, 8 Car. & P. 568; *Hewes v. Parkman*, 20 Pick. 90, 95. Judgment for the plaintiff in trover does not vest the property in the defendant. *Lovejoy v. Murray*, 3 Wall. 1; *Brady v. Whitney*, 24 Mich. 154; *Brinsmead v. Harrison*, L. R. 6 C. P. 584.

interrupted. For example: The defendant, by an officer, makes a declaration of attachment of goods which he knows is already duly levied upon by the plaintiff, has a keeper appointed and then *suffers* the owner of the attached property to take it away and sell it, and receives part of the avails. This is deemed not a conversion.<sup>1</sup>

529. Thus far of cases in which the defendant has appropriated the goods in question to his own use. But, as has been stated, a wrongful act of dominion may be committed without so appropriating the goods. It is Conversion to another's use. enough that the defendant has wrongfully deprived the plaintiff of the possession of his goods or usurped his rights over them, though for the benefit of a third person.

530. In cases of this kind it was formerly supposed that an intention to deprive the plaintiff of his goods was necessary; but this has been decided to be incorrect. The question still is whether there has been a wrongful exercise of dominion by the defendant; if there has been an unauthorized act which deprived the plaintiff of his property permanently or for an indefinite time, there has been a conversion.<sup>2</sup> If not, the contrary is true. For example: The defendant, manager of a ferry, receives on board his boat the plaintiff, with two horses. Before starting, the plaintiff is reported to the defendant as behaving improperly, and though he has paid his fare for transportation, and the defendant tells him that he will not carry the horses, and that they must be taken ashore, the plaintiff refuses to take them off the boat, whereupon the defendant puts them ashore, and has them taken to a livery for keeping. The plaintiff goes with the boat, and the next day sends to the livery stable for his horses. In reply, the plaintiff is told that he can have his horses by coming and paying the charges for keeping, other-

<sup>1</sup> Polley v. Lenox Iron Works, 2 Allen, 182, adopting the language of Heath, J., in Bromley v. Coxwell, 2 B. & P. 438, that 'to support an action of trover there must be a positive tortious act.' Here the defendant was merely 'suffered' to take and sell the property.

<sup>2</sup> Hiort v. Bott, L. R. 9 Ex 86, 89, Bramwell, B.

wise they would be sold to pay expenses. They are sold accordingly, and damages as for a conversion are sought of the defendant. The action is not maintainable, since there is nothing to show that the defendant wrongfully deprived the plaintiff, even for a moment, of his property.<sup>1</sup>

531. Any asportation of a chattel however *for the use* of a third person amounts to a conversion, for the reason that the act is inconsistent with the right of dominion which the owner (or person entitled to possession) has in it.<sup>2</sup> And the same is true of an intentional, or possibly negligent, destruction of the chattel.<sup>3</sup>

532. In the case of acts of co-owners (cotenants) it is held by many authorities that nothing short of a substantial destruction of the common property by the wrongful  
**Cotenancy.** act of one of them can make him liable to the other or others for conversion.<sup>4</sup> This is on the ground that each of the common owners has a right to the entire possession and use of the property. A sale and delivery, though absolute, would not be enough; for the purchaser would only become a co-owner with the others.<sup>5</sup> By many other authorities it is held that a sale and delivery of the property, absolutely, would suffice.<sup>6</sup> Some authorities even treat the mere withholding of the chattel by a cotenant from his fellow, or the misuse of it, or the refusal to sever and terminate the cotenancy, as a conversion.<sup>7</sup> But it is not necessary by any

<sup>1</sup> *Foulds v. Willoughby*, 8 M. & W. 540. For other examples see *Simmons v. Lillystone*, 8 Ex. 431; *Thorogood v. Robinson*, 6 Q. B. 769.

<sup>2</sup> *Fouldes v. Willoughby*, supra. <sup>3</sup> Id.

<sup>4</sup> *Farrar v. Beswick*, 1 M. & W. 682, 688, Parke, B.; *Morgan v. Marquis*, 9 Ex. 145; *Mayhew v. Herrick*, 7 C. B. 229; *Oviatt v. Sage*, 7 Conn. 95; *Barton v. Burton*, 27 Vt. 93; *Pitt v. Petway*, 12 Ired. 69. Compare the case of trespass, ante, pp. 231-233.

<sup>5</sup> *Morgan v. Marquis*, supra, Parke, B.

<sup>6</sup> *Weld v. Oliver*, 21 Pick. 559; *Wilson v. Read*, 3 Johns. 175; *Dyckman v. Valiente*, 42 N. Y. 549; *White v. Brooks*, 43 N. H. 402; *Dain v. Coning*, 22 Maine, 347; *Arthur v. Gayle*, 38 Ala. 559; *Williams v. Chadbourne*, 6 Cal. 559.

<sup>7</sup> *Agnew v. Johnson*, 17 Penn. St. 373; *Fiquet v. Allison*, 12 Mich. 328. See *Strickland v. Parker*, 54 Maine, 263.



of the authorities that there should be a physical destruction of the property, as by breaking it in pieces; it is enough that the common interest, or rather the plaintiff's interest, is practically destroyed, as by a sale by the cotenant and the buyer's taking the property into another State, there to be kept.<sup>1</sup>

533. If an act, in and of itself being a conversion, has been committed, the injured party is entitled to bring suit without first demanding his property. In other cases, **Demand and refusal.** a demand and wrongful refusal will be necessary, since without them there has been no wrongful exercise of dominion.<sup>2</sup> For example: The defendant collusively purchases goods from a trader on the eve of the trader's bankruptcy, and takes the property into his own possession. The assignee of the trader brings trover without a demand. The action is not maintainable, since the defendant had been guilty of no conversion; the trader being competent to contract, though his contract of sale was liable to impeachment.<sup>3</sup>

534. Of the last example, it should be observed that (in accordance with a principle already stated) the fraud of the trader and the defendant did not make the sale void; its only effect was to render it voidable. The contract was therefore binding until disaffirmed; and a disaffirmance could be made only by a demand of the goods, or by some act tantamount thereto. And the demand and refusal, that is, the conversion, must be apart from the bringing of suit, when such acts are necessary; for the cause of action must have arisen before suit was begun. In the example given, if the defendant had sold the goods, or improperly detained them after a disaffirmance of the sale, the action would have been maintainable.<sup>4</sup>

535. Whether a demand is necessary where property has been sold and delivered by one having no authority to sell, has been a point of conflict of authority. The better view however is that the unauthorized sale and delivery are suffi-

<sup>1</sup> *Pitt v. Petway*, 12 Ired. 69.

<sup>2</sup> *Chitty, Pleading*, i. 157; *Nixon v. Jenkins*, 2 H. Black. 135.

<sup>3</sup> *Nixon v. Jenkins*, *supra*.

<sup>4</sup> *Bloxam v. Hubbard*, 5 East, 407.



cient to constitute a conversion, and hence that demand before suit is not necessary.<sup>1</sup> It is conceded that if the buyer has *taken* the goods away, there is a conversion.<sup>2</sup>

536. A very common instance of the necessity of demand and refusal is where goods have been put into the hands of another for a special purpose, upon agreement to return them when the purpose is accomplished; in regard to which the rule is, that a breach of the contract by the mere failure so to return the goods does not amount to a conversion. Before the bailee can be liable in trover in such a case, supposing there had been no misappropriation or other act of dominion, there must be a demand for the goods and a refusal to restore them.<sup>3</sup> An unqualified refusal will itself, in almost all cases, constitute a conversion.<sup>4</sup>

537. A qualified refusal to deliver goods on lawful demand may however be only *prima facie* evidence of a conversion.<sup>5</sup> The defendant may have found the goods, and refused to surrender them to the plaintiff until he shall have proved his right to them. It follows from what has already been said that such a refusal is justifiable, since, if the plaintiff is not entitled to the goods by right, the defendant as finder has the better claim; and he cannot or may not know that the plaintiff may not be a pretender until he has furnished evidence that he is not. And other cases of the kind might be stated;<sup>6</sup> the only question, where the refusal to return is qualified, is whether it is reasonable.<sup>7</sup>

<sup>1</sup> *Galvin v. Bacon*, 2 Fairf. 28; *Parsons v. Webb*, 8 Greenl. 38; *Stanley v. Gaylord*, 1 Cush. 536; *Trudo v. Anderson*, 10 Mich. 357; *Whitman Mining Co. v. Tittle*, 4 Nev. 494. Contra, *Marshall v. Davis*, 1 Wend. 109; *Barrett v. Warren*, 3 Hill, 348; *Nash v. Mosher*, 19 Wend. 431; *Talmadge v. Scudder*, 38 Penn. St. 517; *Sherry v. Picken*, 10 Ind. 375; *Justice v. Wendell*, 14 B. Mon. 12.

<sup>2</sup> *Ely v. Ehle*, 3 Comst. 506; *Nash v. Mosher*, *supra*; *Marshall v. Davis*, *supra*.

<sup>3</sup> *Severin v. Keppell*, 4 Esp. 156.

<sup>4</sup> *Alexander v. Southey*, 5 B. & Ald. 247, 250.

<sup>5</sup> *Burroughes v. Bayne*, 5 H. & N. 296; *Alexander v. Southey*, *supra*.

<sup>6</sup> See *Pollock*, Torts, 306, 307, 2d ed.

<sup>7</sup> *Alexander v. Southey*, 5 B. & Ald. at p. 250.

538. If the demand be not made upon the defendant himself, but merely left at his house in his absence, it seems that a reasonable time and opportunity to restore the goods should be suffered to elapse before the defendant's non-compliance with the demand can be treated as a refusal amounting to a conversion. Non-compliance with the demand after a reasonable opportunity has been afforded to obey it is however clearly tantamount to a refusal, and is presumptive evidence of a conversion, thus requiring the defendant to explain that the omission to deliver the goods was justifiable.<sup>1</sup>

<sup>1</sup> Chitty, Pleading, i. 160; *Thompson v. Rose*, 16 Conn. 71; *White v. Demary*, 2 N. H. 546.

omit to § 579

## CHAPTER XII.

### INFRINGEMENT OF PATENTS, TRADE MARKS, AND COPYRIGHTS.

*Statement of the duty.* A owes to B the duty (1) not to make, use, or vend, without B's license, a thing patented by B; (2) not, without B's license, to print, publish, or import any copyrighted book of which B owns the copyright, or, knowing the same to be so printed, published, or imported, to sell or expose for sale any copy of such book; and not to violate the rights of B in respect of any other copyrighted matter of which B owns the copyright.<sup>1</sup>

#### § 1. OF PATENTS: WHAT MUST BE PROVED, ETC.

539. The Revised Statutes of the United States grant to patentees, their heirs and assigns, for the term of seventeen years, the exclusive right to make, use, and vend the patented article throughout the United States and the territories thereof;<sup>2</sup> and they allow (besides bills in equity for equitable protection) recovery of damages in an action on the case in the name of the party interested, either as patentee, assignee, or grantee,<sup>3</sup> on proof that the defendant has made, used, or sold the patented article without license of such present owner of the patent.<sup>4</sup>

540. That for which the laws give patents is 'invention,' something, that is to say, which is *created* by original thought, not something which is discovered except in the narrower sense of discovery. When therefore the word 'discovery' is used of something patented,

'Invention':  
'discovery':  
'principle.'

<sup>1</sup> It would make the statement of this duty far too prolix to specify all of the rights and duties arising under this last clause.

<sup>2</sup> U. S. Rev. Sts. § 4884.

<sup>3</sup> *Ib.* § 4919.

<sup>4</sup> See post, p. 272.

it must be understood in the sense of 'invention.' The laws of nature may be discovered by man, but they cannot be invented by him ; hence discovery of them cannot be patented.<sup>1</sup> 'Principle' or 'scientific principle' is often used in this sense of a law of nature, and in *that* sense falls without the patent laws.

541. Invention may cover processes however in which any of the laws of nature are called into use ; but it is the process (or 'principle' or 'discovery' in that sense) that is patentable, not the law of nature, though that law may never have been known before. And then with regard to processes, it is not processes generally that may be patented. A merely mechanical process, or rather the effect produced by such a process, cannot be patented ; or as the law has been laid down from the bench, 'a man cannot have a patent for the function of a machine,'<sup>2</sup> for that would be to prevent the use of better machines for performing the same function or attaining the same result.<sup>3</sup> The processes necessary for making the machine may be patented, not the effect or result to be produced (except with reference to patents for designs). In a word, those processes are patentable which look to results which are to be produced otherwise than by any particular machine or by means not purely mechanical.<sup>4</sup>

542. Anything to be the subject of a valid patent must, besides being the subject of invention, be new and useful.<sup>5</sup>

543. Having the foregoing considerations in mind, the specific subjects of patent, by the laws of the United States, are the following: arts, machines, manufactures, compositions of matter, and designs.<sup>6</sup> These

Subjects of  
patent.

<sup>1</sup> Telephone Cases, 126 U. S. 531 ; O'Reilly v. Morse, 15 How. 112 ; Walker, Patents, § 2, 2d ed.

<sup>2</sup> Corning v. Burden, 15 How. 252, 268.

<sup>3</sup> Id.

<sup>4</sup> Walker, § 6 ; Mowry v. Whitney, 14 Wall. 620 ; Tilghman v. Proctor, 102 U. S. 707 ; Telephone Cases, 126 U. S. 531.

<sup>5</sup> Fermentation Co. v. Maus, 122 U. S. 413, 427 ; Telephone Cases, 126 U. S. 533.

<sup>6</sup> Walker, §§ 2, 20.

terms are not intended to be used with perfect exactness, and yet within certain limits they are intended to be in a general way exclusive of each other; a patent would however be good, generally speaking, if it fell under any one of the subjects named, though it might have been improperly assigned in the letters-patent to a particular subject. But notwithstanding their inexactness, the terms have legal limits, and things which do not fall within the legal meaning of any of them cannot be covered by patents. Thus the word 'manufacture' has in the American law of patents a narrow and technical meaning; it appears to be limited to such things as are made by the hand of man, not embraced within the legal meaning of arts, machines, compositions of matter, or designs.<sup>1</sup>

544. Attention will now be turned to infringement. This must consist in the wrongful making, using, or vending the **Infringement:** patented thing. But the statutes leave it to the **variation.** courts to determine what constitutes a making, using, or vending.

545. Generally speaking, an infringement in the making takes place whenever another avails himself of the subject of the invention of the patentee, without such variation as will constitute a new discovery; or an infringement is a copy made after and agreeing with the principle laid down in the specification of the patent.<sup>2</sup> When a person has obtained a patent for a new invention or a discovery made by his own ingenuity, it is not permitted any one else, by simply varying in form or in immaterial particulars the nature or subject-matter of such invention or discovery, either to obtain a patent for it himself, or to use it without the leave of the patentee. The question then is, in actions for damages for infringements of this nature, not merely whether, in form or condition such as might be more or less immaterial, that which has been done varies from the specification, but whether in reality, in substance, and in effect,

<sup>1</sup> Walker, § 17.

<sup>2</sup> Curtis, Patents, § 289; Calloway v. Bleaden, Webs. Pat. Cas. 523.

the party has availed himself of the patentee's invention, in order to make the thing in question.<sup>1</sup>

**546.** It matters not therefore that the person complained of had succeeded in obtaining a patent for his supposed invention or discovery; if it be in substance and effect a copy of the plaintiff's specification and patent, he will be guilty of a breach of duty to the latter by the making, using, or vending of the subject of it, assuming of course that the plaintiff's patent is valid.

**547.** With regard to machines, it is often a point of difficulty to decide whether a patent is infringed, since the same elements and the same powers must be employed in all machines. The criterion of liability is **Patents of machinery.** however easily stated; it is whether the machine complained of operates upon the same 'principle' with the one patented. The material question must therefore be, not whether the same elements of motion or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation, and the same combination of powers in both machines. Mere colorable differences or slight improvements cannot affect the right of the original inventor.<sup>2</sup>

**548.** It follows that the question of infringement in such cases does not necessarily depend upon the consideration whether the mechanical structure of the machines is alike.<sup>3</sup> **Mechanical structure.** Whatever be the mechanical structure, the question is, whether the later machine contains the means or combination found in the previous one; in a word, whether the new idea is embodied in the machine complained of. If the plaintiff's combination be found substantially incorporated into the defendant's machine, then the latter's

<sup>1</sup> *Walton v. Potter*, Webs. Pat. Cas. 585, Tindal, C. J.; *O'Reilly v. Morse*, 15 How. 62, 123; *McCormick v. Talcott*, 20 How. 402, 405; *Morley Machine Co. v. Lancaster*, 129 U. S. 263, 273.

<sup>2</sup> *Odiorne v. Winkley*, 2 Gal. 51; *McCormick v. Seymour*, 2 Blatchf. 240; *Blanchard v. Beers*, id. 418.

<sup>3</sup> *O'Reilly v. Morse*, 15 How. 62, 123; *Morey v. Lockwood*, 8 Wall. 230; *Ives v. Hamilton*, 92 U. S. 426, 431.



mechanical construction, whatever it may be, is in law but an equivalent for the mechanical construction of the plaintiff's machine. No man is allowed to appropriate the benefit of the new ideas which another has originated and put to use, because he may have been enabled, by superior mechanical skill, to embody them in a different form. In appropriating the idea, he may have appropriated all that is valuable in the new machine.<sup>1</sup>

**549.** The mere fact that the machine alleged to be an infringement does its work better, or turns out more work in the same time, than the patented article, does not show that there is no infringement. This superiority might be due merely to superior construction upon the same principle with that of the patented machine. On the other hand the fact that the defendant's machine is inferior to that of the plaintiff does not show that it is not an infringement.<sup>2</sup> Either result is only to be considered in its bearing upon the question whether the principle of the machine complained of is actually and substantially different from that of the plaintiff.<sup>3</sup> Of course, if the greater or lesser efficiency be produced by reason of the use of means which are different in substance from those employed in the patented machine, and are not their mechanical equivalent, there is no infringement.<sup>4</sup>

**550.** An infringement is also committed, though, besides being equivalent to the thing patented, the later machine accomplishes some other advantage beyond that effected by the patent machine. The new machine is still an infringement, so far as it covers the object of the patent. For example: The defendant, for the purpose of

<sup>1</sup> *Blanchard v. Beers*, supra.

<sup>2</sup> *Waterbury Brass Co. v. Miller*, 9 Blatchf. 77; *Chicago Fruit House Co. v. Busch*, 2 Biss. 472.

<sup>3</sup> *Id.*; *Gray v. James, Peters, C.* C. 394; *Pitts v. Wemple*, 1 Biss. 87; *Carter v. Baker*, 1 Sawy. 512; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 137; *Morley Machine Co. v. Lancaster*, 129 U. S. 263.

<sup>4</sup> Cases just cited.

giving signals by telegraph, uses the earth for effecting a return circuit; the plaintiffs having a patent for giving signals by means of electric currents transmitted through *metallic currents*. The machinery, aside from the return circuit, used by the defendant is the same as that covered by the plaintiff's patent, and is used without license. The defendant is liable, though the use of the earth for effecting a return circuit is an improvement in the art of telegraphing.<sup>1</sup>

551. Where however the means employed in the later machine are different, not merely in form, but in substance, and consist in combinations differing in substance, Difference in substance. there is no infringement, though the object be to produce the same result. For example: The defendant constructs a machine for obtaining a current of air between the grinding surfaces of mill-stones, by means of a rotating vane, for effecting which the plaintiff also has a machine, protected by patent. The plan of the defendant is to remove from the centre of both stones a large circular portion, and in this space, opposite the opening between the two stones, to place a fan, by the rapid rotation of which a centrifugal motion is given to the air, driving it between the stones. The plan of the plaintiff consists of a portable ventilating machine, blowing by a screw vane, which causes a current of air parallel to the axis of the vane, being attached externally to the eye of the upper millstone; and the screw vane being thus set in rapid motion, the air is forced through the eye into the centre of the stones, and so finds its way out again. The defendant's machine is not an infringement upon the plaintiff's.<sup>2</sup>

552. To substitute in place of some one element in a composition of patented matter a mere known equivalent is an infringement, because, though the patentee may Equivalents. not have expressly mentioned such equivalent in his claim, he is understood to have included it, and in contemplation of law he has included it. However, if he should confine himself to the specific equivalents mentioned in his claim for the patent, by excluding all others, the case would

<sup>1</sup> Electric Tel. Co. v. Brett, 10 C. B. 838.

<sup>2</sup> Bovill v. Pimm, 11 Ex. 718.

be different, and there would be no infringement in the use of any of such other equivalents.<sup>1</sup>

553. With regard to patents for designs, the patent laws are intended to give encouragement to the decorative arts.

Patents for  
design: re-  
semblance.

They contemplate not so much practical utility as appearance. It is the appearance itself which makes the article salable, and the mode in which these appearances are produced has little, if anything, to do with giving increased salableness to the article. The appearance then furnishes the test of identity of design.<sup>2</sup> Mere difference of lines in the drawing or sketch, a greater or less number of lines, or slight variances in configuration, if insufficient to change the effect upon the eye of the ordinary observer, will not destroy the substantial identity. An engraving which has many lines may present to the ordinary eye the same picture, and to the mind the same idea, as another with fewer lines. If then there be identity of design (not to an expert, but) to the ordinary observer, there is an infringement upon the patented design. For example: The defendant vends a carpet containing figures of flowers arranged in wreaths different in fact, upon close observation, from the plaintiff's patented design for wreaths of flowers upon carpets; the flowers on the defendant's carpet being fewer in number than those on the plaintiff's, and the wreaths being placed at somewhat wider distances. But this difference would not be detected except upon a close comparison. The defendant is liable to the plaintiff in damages.<sup>3</sup>

554. Under the statute, the mere making, except for experiment, without the sale or use of the articles or object patented, is an infringement of the rights of the patentee; and it follows that such an act may be treated as a ground of liability, though no damage be sus-

<sup>1</sup> *Byam v. Farr*, 1 Curtis, C. C. 260; *Woodward v. Morrison*, Holmes, 124, 131; *Tyler v. Boston*, 7 Wall. 327.

<sup>2</sup> *Gorham Co. v. White*, 14 Wall. 511, 528.

<sup>3</sup> *Gorham Co. v. White*, 14 Wall. 511.

tained by the patentee. He will be entitled to recover nominal damages at least;<sup>1</sup> and perhaps substantial damages should the act be repeated.<sup>2</sup> It is equally a ground of liability to use an article which is an infringement of a patent, though the party using it did not make it; and the same is true of the sale of such an article. Each of these acts is an invasion of the patentee's right, and the party doing the act is liable, however innocent of any intention to injure the true patentee, or even of knowledge of the existence of the patent.<sup>3</sup>

555. Any one may, without license, make a patented article for mere experiment, or for the purpose of ascertaining the sufficiency of the thing to produce the effects claimed for it, or perhaps when it is made for mere amusement, or as a model.<sup>4</sup> But it must not be exposed for sale, nor must it have been made for the purpose of pecuniary profit, though experiment was also part of the purpose.<sup>5</sup>

556. The unauthorized sale of a patented machine, to constitute an infringement, must be a sale, not of the materials of a machine, either separate or combined, but of a complete machine, with the right, expressed or implied, of using the same in the manner secured by the patent. It must be a tortious sale, it has been said, not for the purpose merely of depriving the owner of the materials, but of the use and benefit of his patent, — a point however of some doubt, as has already been observed. The sale of the materials merely cannot, it is clear, amount to an infringement. For example: The defendant, a deputy sheriff, having an execution against the plaintiffs, levies upon and sells the materials of three patented machines, of which

Unauthorized  
sale of materials.

<sup>1</sup> *Whittemore v. Cutter*, 1 Gal. 429.

<sup>2</sup> Compare the rule in trespass to land, ante, p. 236.

<sup>3</sup> *Parker v. Haworth*, 4 McLean, 370, 373; *Bate Refrigerator Co. v. Gillett*, 31 Fed. Rep. 809, 815.

<sup>4</sup> *Beedle v. Bennett*, 122 U. S. 71, 77; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 134; *Frearson v. Loe*, 9 Ch. D. 48. See *Whittemore v. Cutter*, 1 Gal. 429; *Sawin v. Guild*, id. 485; *Jones v. Pearce*, Webs. Pat. Cas. 125.

<sup>5</sup> *Smith Manuf. Co. v. Sprague*, 123 U. S. 249, 256.

the plaintiffs are owners, the materials being at the time complete and fit for operation as machines. The purchaser has not put any of the machines into operation; nor is the sale made with intent that he should do so. This is not a breach of duty to the plaintiffs.<sup>1</sup>

557. The sale or use of the product of a patented machine is no violation of the exclusive right to use, construct, or sell the machine itself; and the patent for a discovery of a new and improved process, by which any product or manufacture before known in commerce may be made in a better and cheaper manner, grants nothing but the exclusive right to use the process. Where a known manufacture or product is in the market, purchasers are not bound to inquire whether it was made on a patented machine or by a patented process.<sup>2</sup> But if the patentee be the inventor or discoverer of a new manufacture or composition of matter not known or used by others before his discovery or invention, his franchise or right to use and vend to others to be used is the new composition or substance itself. The product and the process, in such a case, constitute one discovery, the exclusive right to make, use, or vend which is secured to the patentee. For example: The defendants, a railroad company, use, without license of the plaintiff, a certain article called vulcanized India-rubber in their car-springs, for the manufacture of which substance the plaintiff has a valid patent; his specification, though describing primarily a process, still showing that the purpose and merit of the process were the production of a valuable fabric. The plaintiff has a patent in the article itself, and the act of the defendants is a breach of duty to him.<sup>3</sup>

558. Finally, the Revised Statutes of the United States provide that every person who, in any manner, marks upon any thing made, used, or sold by him for which he has not obtained a patent, the name or any imi-

False mark of  
patent.

<sup>1</sup> *Sawin v. Guild*, 1 Gal. 485.

<sup>2</sup> See ante, p. 267.

<sup>3</sup> *Goodyear v. Railroad*, 2 Wall. C. C. 356.



tation of the name of any person who has obtained a patent therefor, without the consent of such patentee, or his assigns or legal representatives; or who, in any manner, marks upon or affixes to any such patented article the word 'patent' or 'patentee,' or the words 'letters patent,' or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee or his assigns or legal representatives; or who, in any manner, marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable for every such offence, to a penalty of not less than one hundred dollars, with costs; one-half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offence may have been committed.<sup>1</sup>

## § 2. OF TRADE MARKS.

559. The law relating to trade marks has been changing its point of view, if not its grounds, in recent times, and becoming, as has been observed in another place,<sup>2</sup> assimilated to the law of property. The old mode of suing for deceit is falling into disuse as a remedy for infringing a trade mark, in the light of the better remedy afforded by equitable proceedings. But it is not likely that the law will advance to the point of assimilating the law of trade marks so far with the law of property (as e. g. the law of patents) as to make it safe to say that, for the purpose of recovering damages, the old authorities, which make the action virtually an action for deceit, are obsolete.<sup>3</sup>

560. The subject, with this suggestion, must then be dropped in this connection; for while an ample remedy is provided upon the footing of a property right in the trade

<sup>1</sup> Rev. Sts. § 4901.

<sup>2</sup> Ante, p. 84, note.

<sup>3</sup> See *Reddaway v. Bentham Hemp-spinning Co.*, 1892, 2 Q. B. 639, 644, 646.

Change of  
ground: in-  
junction.



mark where damages are not sought, it is to be borne in mind that this book is a treatise relating to actions for damages.<sup>1</sup> In a word, an injunction, or nominal damages, may be had in respect of the infringement of a trade mark right, without further requirement; but it is not clear whether substantial damages can be obtained without proof of fraud as interpreted by the courts in the law of deceit.

### § 3. OF COPYRIGHTS: WHAT MUST BE PROVED, ETC.

561. The Revised Statutes of the United States grant to any citizen of the United States or resident therein, who shall **What may be copyrighted.** be the author,<sup>2</sup> inventor, designer, or proprietor of any book,<sup>3</sup> map, chart, dramatic or musical composition, engraving, cut, print, or photograph,<sup>4</sup> or negative thereof, or of a painting,<sup>5</sup> drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person, who complies with certain preliminary requirements, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it,<sup>6</sup> or causing it to be performed or represented by others; and to authors the privilege of reserving the right to dramatize or to translate their own works.<sup>7</sup> Proof of ownership of the copyright and the

<sup>1</sup> See Cooley, Torts, 423-430, 2d ed. The authority of Congress over trade marks is limited. Trade Mark Cases, 100 U. S. 82.

<sup>2</sup> One may be an 'author' of a verbatim report of another's public lectures. *Walter v. Lane*, 1900, A. C. 539. As to class-room lectures see *Caird v. Sime*, 12 App. Cas. 326, *infra*, note 2, p. 277.

<sup>3</sup> A newspaper is a 'book.' *Walter v. Lane*, *supra*.

<sup>4</sup> See *Burrow Lithographic Co. v. Sarony*, 111 U. S. 53, showing that the photograph should represent an original conception.

<sup>5</sup> *Parton v. Prang*, 3 Cliff. 537.

<sup>6</sup> See *The Iolanthe Case*, 15 Fed. Rep. 439; *The Mikado Case*, 25 Fed. Rep. 183; *Tompkins v. Halleck*, 133 Mass. 32 (on hearing and committing to memory a play, then writing it out and presenting it; this was held an infringement, overruling *Keene v. Kimball*, 16 Gray, 545).

<sup>7</sup> Rev. Sts. § 4952.

sale or other act protected, without license, of articles covered by it, will make a presumptive case.

562. The copyright is to be good for twenty-eight years, with the right of renewal for fourteen years more.<sup>1</sup> And any person who, without consent of the owner of the copyright, obtained in writing signed by two or more witnesses, shall print, publish, or import any book, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof, and be liable in damages for the act.<sup>2</sup>

563. To the author of copyrighted matter thus belongs the exclusive right to take all the profits of publication which the sale of the copyrighted matter may produce.

And the author's exclusive right extends to the whole copy, and, in a sense, to every part of it. What copy-right covers : infringement.

It follows that an infringement of a man's copyright may be committed (1) by reprinting the whole copy, verbatim; (2) by reprinting, verbatim, a part of it; (3) by imitating the whole or a part, or by reproducing the whole or a part with colorable alterations or disguises, intended to give to it the character of a new work; (4) by reproducing the whole or a part under a colorable abridgment, not fairly constituting a new work.

564. With regard to these forms of infringement, it is to be observed that the defendant's intention does not enter into the determination of the question of piracy.<sup>3</sup>

The question is one of property, analogous to Intention. cases of trespass or conversion; the exclusive privilege which the law secures to authors may be equally violated whether the work complained of has been published with or without the animus furandi. The fact that a party has honestly

<sup>1</sup> Rev. Sts. §§ 4953, 4954.

<sup>2</sup> Rev. Sts. § 4964. The author has property at common law in his manuscript. *Wheaton v. Peters*, 8 Peters, 591, 657. (As to letters, see *Perceval v. Phipps*, 2 Ves. & B. 19.) But *copyright* is a matter of statute purely. *Id.*; *Albert v. Strange*, 1 Macn. & G. 25. The author of classroom lectures will be protected at common law against unauthorized publication. *Caird v. Sime*, 12 App. Cas. 326. See *Walter v. Lane*, 1900, A. C. 539, 547.

<sup>3</sup> *Clement v. Maddick*, 1 Giff. 98.

mistaken the extent of his right to avail himself of the works of others will not excuse him from liability.<sup>1</sup>

565. Piracies of the nature of those mentioned under the first head are seldom committed, and they may be dismissed with the observation that it matters not how much original and valuable matter may be incorporated with the reprint of the copyrighted matter. The act is still an infringement, though the public might derive great benefit from the superior value of the work.

566. Piracies of the second class are more difficult to deal with. The quantity of matter cannot be a true criterion of the commission of an infringement,<sup>2</sup> since only a small portion of a work may be pirated, and this the most important part of the work, or a very important part of it. For example: The defendant makes use, in a published volume of judicial decisions, of the head-notes, or marginal notes, of the plaintiff in a series of volumes of reports, of which the plaintiff owns the copyright. This is an infringement of the plaintiff's rights, for which the defendant is liable; though such notes constitute but a small part of the plaintiff's work.<sup>3</sup>

567. It may be doubtful if any part of the work of another may be taken *animo furandi*.<sup>4</sup> How much may be honestly taken, that is, taken without any purpose of supplanting the copyright work, is the difficult question. It is clear that, if so much be taken as to diminish sensibly the value of the original, an infringement has been committed.<sup>5</sup> It is not only quantity, but value also, that must be taken into the consideration.<sup>6</sup>

<sup>1</sup> *Emerson v. Davies*, 3 Story, 768.

<sup>2</sup> *Bramwell v. Halcomb*, 3 Mylne & C. 737; *Bradbury v. Hotten*, L. R. 8 Ex. 1.

<sup>3</sup> See *Wheaton v. Peters*, 8 Peters, 591; *Saunders v. Smith*, 3 Mylne & C. 711; *Sweet v. Sweet*, 1 Jur. 212; *Sweet v. Benning*, 16 C. B. 459.

<sup>4</sup> Mr. Godson thinks it cannot. *Patents and Copyrights*, 216. Mr. Curtis, *contra*. *Copyrights*, 251, note.

<sup>5</sup> *Bramwell v. Halcomb*, 3 Mylne & C. 737; *Saunders v. Smith*, *id.* 711.

<sup>6</sup> *Id.*

568. In deciding questions of this sort, it has been observed that the nature and objects of the selections made must be taken into account, the quantity and value of the materials used, and the extent to which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work.<sup>1</sup> Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused into another work, so as to be distinguishable in the mass of the latter; but yet the latter, having a distinct purpose from the copyrighted book, may not be an infringement. In other cases the same materials may be used as a distinct feature of excellence, and constitute the chief value of the new work, and then the latter will be an infringement.<sup>2</sup> Be the quantity then large or small, if the part extracted furnish a substitute for the work from which it is taken, so as to work an appreciable injury, there is an actionable violation of copyright.<sup>3</sup>

Nature and  
objects of  
selection.

569. A person is entitled to make a reasonable amount of quotation from a copyrighted production by way of review or criticism; but, under the pretence of review, no one has the right to publish a material part of the author's work;<sup>4</sup> that is, such a part as might have a sensible effect in superseding the original,<sup>5</sup> — not perhaps as a whole, but quoad hoc.<sup>6</sup>

Reasonable  
quotation.

570. In regard to imitations of the whole or part of a copyrighted work, the difficulty of determining the question of piracy is scarcely less. There may be likeness without copying; and, though the copyrighted work may have suggested the new one, the imitation may not be close enough to amount to infringement. The ques-

Imitations.

<sup>1</sup> *Folsom v. Marsh*, 2 Story, 100.

<sup>2</sup> *Id.*

<sup>3</sup> *Curtis*, Copyright, 245; *Folsom v. Marsh*, 2 Story, 100.

<sup>4</sup> See *Wilkins v. Aiken*, 17 Ves. 422, 424.

<sup>5</sup> *Roworth v. Wilkes*, 1 Campb. 94.

<sup>6</sup> *Curtis*, 246, note.

tion however is, whether the variation be substantial or merely colorable.<sup>1</sup> For example: The defendant is alleged to have infringed the plaintiff's copyright in an Arithmetic by imitating its plan and contents. The test of the defendant's liability is whether he has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own work, with colorable alterations and variations, only to disguise the use thereof, or whether the defendant's work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, the resemblances being accidental, or arising from the nature of the work;—whether, in short, the defendant's work be quoad hoc a servile or evasive imitation of the plaintiff's work, or a bona fide original composition from other common or original sources.<sup>2</sup>

571. In cases of this kind, it is not enough to establish a violation of duty that some parts or pages of the later work bear resemblances in methods, details, and illustrations to the copyrighted work. It must further appear that the resemblances in those parts or pages are so close, so full, so uniform, and so striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or is mainly borrowed from it.<sup>3</sup>

572. It is to be observed therefore that it does not follow that because the same sources of information are open to all persons, and by the exercise of their own skill, talent, or industry they could, from all of these sources, have produced a similar work, one party may, at second hand, without any exercise of skill, talent, or industry, borrow from another all the materials which have been accumulated and combined by him. For example: The defendant copies a map of a town from the plaintiff's copyrighted map, the latter being made by actual surveys of the region. This is an infringement of the plaintiff's copyright,

<sup>1</sup> *Trusler v. Murray*, 1 East, 363, note; *Emerson v. Davies*, 3 Story, 768, 793.

<sup>2</sup> *Emerson v. Davies*, *supra*.

<sup>3</sup> *Id.*

though the means used by the plaintiff for making his map were open to all persons alike.<sup>1</sup>

**573.** The next case is that of abridgments; the rule of law in England as to which is said to be, that a fair abridgment, when the understanding is employed in retrenching unnecessary circumstances, is not a piracy **Abridgments.** of the original work. Such an abridgment is allowable as constituting a new work.<sup>2</sup>

**574.** It is not clear what the American law upon this point is. It is certain however that to justify an abridgment of a copyrighted work, the case must be one of a bona fide character, and not a mere evasive reproduction of the original, by the omission of some unimportant parts. It is also a matter for consideration whether the new work will prejudice or supersede the old, whether it will be adapted to the same class of readers, and often other things of the same sort must be weighed. In many cases, the question may turn upon a consideration not so much of the quantity used as of the value of the selected materials,<sup>3</sup> as has been observed in another connection.

**575.** The true question in cases of this kind indeed appears to be whether there has been a legitimate use of the copyright publication, in the fair exercise of the mind, deserving the name of a new work. If there has been, though it may be prejudicial to the original author, it is not deemed to be an invasion of his rights. If there has not been, then it is treated as a mere colorable curtailment of the original work, and an evasion of the copyright.<sup>4</sup>

**576.** Digests of larger works fall under the head of abridgments. Such publications are in their nature original. The compiler intends to make a new use of them not intended by the original author. But such works **Digests.**

<sup>1</sup> See *Gray v. Russell*, 1 Story, 11, 18.

<sup>2</sup> *Copinger, Copyrights*, 101.

<sup>3</sup> *Gray v. Russell*, 1 Story, 19.

<sup>4</sup> 2 Story, *Equity*, § 939. See also *Story v. Holcombe*, 4 McLean, 306.



must be real digests, and not mere colorable reproductions of the original, in whole or in an essential part. The work bestowed upon a digest must be something more than the labor of the pen and the arrangement of extracts; it must be mental labor, designed to produce a new work, the object of which must clearly appear to be consistent with the rights of the author of the original work.<sup>1</sup>

**577.** It is not an infringement of a copyright, by the American law, to translate, without license of the author, a copyrighted work into a foreign language;<sup>2</sup> unless  
**Translations.** the author has reserved the right of translation. And this is true in America, though the author has himself procured and copyrighted a translation of his work into the same language with the translation complained of. For example: The defendant translates into German a book entitled 'Uncle Tom's Cabin,' and publishes his translation here; the plaintiff, the author, having previously procured her work to be translated into that language, and having procured a copyright upon her translation. The defendant has violated no duty to the plaintiff.<sup>3</sup>

**578.** Finally, the Revised Statutes of the United States provide that every person who shall print or publish any  
**Printing manuscript without authority.** manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury.<sup>4</sup>

<sup>1</sup> See the remarks of Lord Lyndhurst in *D'Almaine v. Boosey*, 1 Younge & C. 288, a case of infringement of a copyrighted musical composition.

<sup>2</sup> *Stowe v. Thomas*, 2 Wall. C. C. 547.

<sup>3</sup> *Stowe v. Thomas*, *supra*. See *Shook v. Rankin*, 6 Biss. 477.

<sup>4</sup> U. S. Rev. Sts. § 4967. See *Perceval v. Phipps*, 2 Ves. & B. 19; s. c. 13 Rev. R. 1, and Preface to last-named; injunction to restrain publication of letters.

*omit printing of letters.*

## CHAPTER XIII.

### VIOLATION OF RIGHTS OF SUPPORT.

*Statement of the duty.* A owes to B the duty (1) not to remove, to B's damage, the lateral support of B's land, while it lies in its natural condition, or while, under title by grant or prescription, it lies in an artificial condition; (2) not to remove negligently, to B's damage, the lateral support of B's land with the superincumbent weight of buildings or materials thereon, adjacent to the boundary; (3) not to withdraw, to B's damage, the subjacent support of his premises.

#### § 1. OF LATERAL SUPPORT: WHAT MUST BE PROVED, ETC.

579. The owner of land has a right, against his neighbor, to what is termed the lateral support of the land. This right of lateral support is a right of support of the land in its natural condition, or, in case of grant or prescription, in an artificial condition; and this right of support of land in its natural condition is, *prima facie*, a right analogous to the right to make use of a running stream or of the air. It is not in the nature of an easement, and does not depend upon prescription or grant.<sup>1</sup> But of course a right to remove the support may be acquired by grant,<sup>2</sup> though not by custom or prescription, because that, it is said, would be oppressive and unreasonable.<sup>3</sup>

<sup>1</sup> *Bonomi v. Backhouse*, El., B. & E. 622, 646; s. c. 9 H. L. Cas. 503. See *Darley Colliery Co. v. Mitchell*, 11 App. Cas. 127; *Bonaparte v. Wiseman*, 89 Md. 12, 23; *Shafter v. Wilson*, 44 Md. 280.

<sup>2</sup> *Rowbotham v. Wilson*, 8 H. L. Cas. 348, and Maryland cases as just cited.

<sup>3</sup> *Hilton v. Granville*, 5 Q. B. 701; *Wakefield v. Buccleuch*, L. R. 4 Eq. 613.

580. This right of support of the land surrounding a man's premises, unlike rights of property in general, is not infringed, for the purposes of a suit for tort, unless **Damage necessary.** removing the soil cause damage;<sup>1</sup> but damage being caused by the removal of support, a right of action arises. Accordingly, to prove the removal of the lateral support of the plaintiff's land in its natural condition, to the plaintiff's damage, will make a prima facie case.<sup>2</sup> For example: The defendant, owner of premises adjoining the premises of the plaintiff, which are located upon the side of a declivity, excavates the earth of his land so closely to the boundary between his own and the plaintiff's property as to cause the soil of the plaintiff's premises, of its own natural weight, to slide away into the pit. This is a breach of duty to the plaintiff, for which the defendant is liable in damages.<sup>3</sup>

581. The doctrine however goes no further than to sustain a right of action for the sinking of land in its natural condition. The action cannot be maintained if the **Land in natural condition.** sinking be due to a superincumbent weight placed upon the plaintiff's premises, unless indeed some distinct right has been acquired against the adjoining occupant. For example: The defendant digs a gravel pit in his premises close to the line between his own and the plaintiff's land. Within two feet of the line, on the plaintiff's land, stands a brick house, erected ten years before, and occupied by the plaintiff. By reason of the defendant's excavation, the premises being located on the side of a hill, it becomes necessary for

<sup>1</sup> *Bonomi v. Backhouse*, supra.

<sup>2</sup> *Thurston v. Hancock*, 12 Mass. 220; *Cases on Torts*, 325. See *Gilmore v. Driscoll*, 122 Mass. 199; *Bonaparte v. Wiseman*, 89 Md. 12; *Shafter v. Wilson*, 44 Md. 280. Some doubt was cast upon this doctrine in a dictum in *Radeliff v. Brooklyn*, 4 Comst. 195, 203, on the ground that it might interfere in cities with the use of property. But this dictum has been disregarded. *Farrand v. Marshall*, 21 Barb. 409, 414; *McGuire v. Grant*, 1 Dutch. 356, 367. See *Foley v. Wyeth*, 2 Allen, 131. As to giving notice, in cities, to the adjoining owner see *Bonaparte v. Wiseman*, 89 Md. 12; *Shafter v. Wilson*, 44 Md. 280.

<sup>3</sup> *Thurston v. Hancock*, supra.

the plaintiff to vacate his house, and to take it down, to prevent it from sliding into the defendant's pit. The defendant is not liable, since the plaintiff had acquired no legal right to the support of his house.<sup>1</sup>

582. A right to lateral support of buildings is in the nature of a right of easement, and in England can be acquired either by grant or by prescription.<sup>2</sup> In this country the right cannot, it seems, be acquired by prescription.<sup>3</sup> But even in England, though a building may have stood upon the plaintiff's premises for the period of prescription, if its walls were improperly constructed, so as for this cause to give way, and not by reason of the excavation alone, the plaintiff cannot recover.<sup>4</sup> And the same would be true, if, within the period of prescription, a new story were added to the house, whereby the pressure was so increased as to cause the sinking.<sup>5</sup>

The right an easement, in nature.

583. On the other hand, it is to be observed that the mere fact that there were buildings, recently erected, standing upon the border of the owner's land when it sank, will not prevent his recovering damages. If the soil sank, not on account of the additional weight, but on account of the operations in the adjoining close (though they were carefully conducted), and would have sunk had there been no buildings upon it, it is held in England that the person sustaining the damage is entitled to redress to the extent of his loss.<sup>6</sup> Clearly if the operation in the adjoining land

Buildings on the land.

<sup>1</sup> *Thurston v. Hancock*, supra; *Caledonian Ry. Co. v. Sprott*, 2 Macq. 449; *Partridge v. Scott*, 3 M. & W. 220.

<sup>2</sup> *Dalton v. Angus*, 6 App. Cas. 740; infra, p. 286.

<sup>3</sup> *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Tunstall v. Christian*, 80 Va. 1. Yet it has been common in this country to speak of the right as arising from grant or prescription. See *Gilmore v. Driscoll*, supra, and cases there cited.

<sup>4</sup> *Richart v. Scott*, 7 Watts, 460; *Dodd v. Holme*, 1 Ad. & E. 493.

<sup>5</sup> See *Murchie v. Black*, 34 L. J. C. P. 337.

<sup>6</sup> *Stroyan v. Knowles*, 6 H. & N. 454. But some courts hold that the value of the buildings could not be recovered, unless there was negligence; assuming that no right had been acquired by grant (or by prescription, if a right can so be acquired). *Gilmore v. Driscoll*, 122 Mass. 199, 206, 207.

was conducted with a negligent disregard to the rights of the plaintiff, and the effect of such negligence was the fall of the plaintiff's building, the adjoining occupant is liable therefor.<sup>1</sup>

**584.** But in the absence of negligence in the defendant, if the damage to the plaintiff's premises would have been slight and inappreciable had there been no superincumbent weight, he will not be entitled to recover. For example: The defendant digs a well near the plaintiff's land, which causes the same to sink, and a building erected there within twenty years falls. If the building had not been on the plaintiff's land, the land would still have sunk, but the damage to the plaintiff would have been inappreciable. This is no breach of duty.<sup>2</sup>

**585.** The result therefore is, (1) that the defendant is liable for the damages suffered by his neighbor from the withdrawal of the lateral support when that act, of itself, **Summary.** and without the fault of the neighbor, was the cause of the damage, including in England, but not in this country, damage done to sound buildings built twenty years or more before; though the excavation was carefully made. (2) He is liable for all the damage suffered by withdrawing the support when he was guilty of negligence, including in the damages injuries to soundly built buildings however recently erected. (3) He is not liable, in the absence of grant or prescription, if the subsidence was caused by the weight of buildings, or by the defective condition of the same.

**586.** The right of lateral support to contiguous buildings may be acquired by grant or reservation, or in England, but not in this country, by prescription.<sup>3</sup> Where buildings have

<sup>1</sup> See *Gilmore v. Driscoll*, supra; *Charless v. Rankin*, 22 Mo. 566, 574; *Schrieve v. Stokes*, 8 B. Mon. 453, 459; *Dodd v. Holme*, 1 Ad. & E. 493; *Bibley v. Carter*, 4 H. & N. 153.

<sup>2</sup> *Smith v. Thackerah*, L. R. 1 C. P. 564.

<sup>3</sup> *Dalton v. Angus*, supra; *Lemaitre v. Davis*, 19 Ch. D. 281. Not by prescription, *Tunstall v. Christian*, 80 Va. 1. See also *Gilmore v. Driscoll*, 122 Mass. 199, 207.



been erected in contiguity by the same owner, and therefore require mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support in favor of the original owner on a sale by him of any of the buildings. As against himself, on the other hand, there is a presumed grant of the right of support in favor of the purchaser, which right takes effect at once. And the reservation in the original owner, after one sale, of the right of support for the adjoining building, will enable a second purchaser, on buying this adjoining house, to elaim against his neighbor the same right of support; since by the purchase he acquires all of his vendor's rights. It follows also that the same mutual dependency continues after subsequent alienations by the purchasers from the original owner, and this regardless of the question of time. For example: The defendant constructs a drain under his house to connect with a public sewer, and thereby weakens the support of the wall separating the defendant's house from the plaintiff's, to the injury of the latter's house. The two houses originally belonged to the same person, who had devised them both for ninety-nine years to W. The latter mortgages both to B, who assigns the mortgage to H, and H conveys (under a power) one of the houses to the plaintiff in July, and the other to the defendant in September following. The defendant's act in weakening the support of the plaintiff's house is a breach of duty, and the defendant is liable.<sup>1</sup>

587. But the right to such support of buildings is not a natural right; and where the adjoining buildings were erected by different owners the right of support can be acquired in favor of either of the original owners (and their successors in estate) only by grant of the other or reservation, or in England by prescription. For example: The defendants pull down a house adjoining the plaintiff's, without shoring up the latter, and thereby cause damage to the plaintiff's property. The houses were built about the same time, but by different owners of the soil; and there is no title to support

Lateral support: how the right may be acquired: mutual support.

<sup>1</sup> Richards v. Rose, 9 Ex. 218.



either by grant or by prescription, nor has the pulling down been negligently done. The defendants are not liable; at least if the plaintiff has sufficient notice of the purpose of the defendants to enable him to take the proper precautions against the damage.<sup>1</sup>

**588.** If there be an intervening house or store in the block, between the premises of the plaintiff and those of the defendant, the pulling down of the latter's building cannot be a breach of duty to the former in the absence of some special engagement between the parties, especially if the plaintiff's building was already in an unsafe condition.<sup>2</sup>

**589.** There appears to be no obligation resting upon the owner of a house towards his neighbor in the adjoining tenement to keep his house in repair (further than to prevent the same from becoming a nuisance<sup>3</sup>) in a lasting and substantial manner. The only duty is deemed to be to keep it in such a state that his neighbor may not be injured by its fall. The house may therefore be in a ruinous condition, provided it be shored up sufficiently, or the house may be demolished altogether, if this can be done without injury to the adjoining house.<sup>4</sup>

**590.** If either of the cotenants of a party-wall<sup>5</sup> should wish to improve his premises before the wall has become ruinous, or incapable of further answering the purposes for which it was built, he may underpin the foundation, sink it deeper, and increase, within the limits of his own land, the thickness, length, or height of the wall, if he can do so without injury to the building upon the adjoining close. And to avoid such injury, he may shore up and support the original wall for a reasonable time, in order to exca-

<sup>1</sup> *Peyton v. London*, 9 B. & C. 725.

<sup>2</sup> *Solomon v. Vintners' Co.*, 4 H. & N. 585.

<sup>3</sup> Compare *Giles v. Walker*, 24 Q. B. D. 656, as to care of premises on which thistles grow.

<sup>4</sup> *Chauntler v. Robinson*, 4 Ex. 163, 170.

<sup>5</sup> For the different kinds of party-walls, see *Watson v. Gray*, 14 Ch. D. 192; *Weston v. Arnold*, L. R. 8 Ch. 1084.

vate and place a new underpinning beneath it; or he may pull the wall down for the purpose of building a new one.<sup>1</sup> To pull the wall down without intending to replace it would be evidence of an ouster, for which an action could be maintained.<sup>2</sup>

591. It is held that one of the cotenants cannot, without consent of the other, interfere with the wall unless he can do so without injury to the adjoining building. No degree of care or diligence in the performance of the work will relieve him from liability, if injury be done to the adjoining building by making the improvements. For example: The defendant, co-owner with the plaintiff of a party-wall between their premises, digs down his cellar about eighteen inches, underpinning the party-wall, and lowers the floor of his first story the same distance. In consequence of these operations, the division wall settles several inches, carrying down the plaintiff's floors, and cracking the front and rear walls of his (the plaintiff's) building. The defendant is liable to the plaintiff for the damage thus caused, though the said operation were carried on prudently and carefully.<sup>3</sup>

592. It follows that, if a party-wall rest upon an arch, the legs of which stand within the land of the respective owners, neither can remove one of the legs to the detriment of his neighbor, without his consent.<sup>4</sup> On the other hand, either may run up the wall to any height, provided no damage be thereby done to the other.<sup>5</sup>

593. The existence of a right to fix a beam or timber into the wall of a neighbor's house depends upon the situation of the wall. If it stand wholly upon the land of the owner, it is clear that no such right can exist except by grant or possibly by prescription. Any

Fixing beams  
into party-  
walls.

<sup>1</sup> *Standard Bank v. Stokes*, 9 Ch. D. 68.

<sup>2</sup> *Jones v. Read*, 10 Ir. R. C. L. 315, Ex. Ch.

<sup>3</sup> *Eno v. Del Vecchio*, 6 Duer, 17, 27; s. c. 4 Duer, 58.

<sup>4</sup> *Partridge v. Gilbert*, 15 N. Y. 601; *Dowling v. Hennings*, 20 Md. 179.

<sup>5</sup> *Matts v. Hawkins*, 5 Taunt. 20; *Brooks v. Curtis*, 50 N. Y. 639, 644. See *Dauenhauer v. Devine*, 51 Texas, 480.

attempt by the adjoining owner to fix a timber in the wall, without consent given, would be a trespass, for which an action would lie; or (probably) it could be treated as a nuisance and abated accordingly. And a wall thus situated (the adjoining owner having acquired no right to the enjoyment of it) may be altered or removed at pleasure, provided no damage be thereby done to the adjoining premises.

594. If however the wall be a party-wall owned in severalty to the centre thereof, or in common, by the adjoining owners, the case will of course be different; and each will be entitled to fix timbers into it, in a prudent manner, doing no damage to the other owner.<sup>1</sup>

595. Where the wall is owned in severalty to the centre, it is clear that neither owner can extend his timbers beyond the centre of the wall. To pass the line of division without permission would be as much a trespass as to make an entry upon the soil without permission.

596. On the other hand, the case would clearly be different if the wall were owned in common by the adjoining proprietors, since, as has elsewhere been observed,<sup>2</sup> each of the tenants in common is seised of the whole common property. And it follows that such a wall may also be taken down by either owner, for the purpose of rebuilding, if necessary.<sup>3</sup>

## § 2. OF SUBJACENT SUPPORT: WHAT MUST BE PROVED, ETC.

597. While ordinarily a man's title to land includes the underlying soil to an indefinite extent towards the centre of the earth, it is settled law that there may be two freeholds in the same body of earth measured superficially and perpendicularly down towards the earth's centre; to wit, a freehold in the surface soil and enough lying beneath it to support it, and a

Underground  
freehold; limited right of  
excavation.

<sup>1</sup> See L. C. Torts, 555.

<sup>2</sup> Ante, p. 231.

<sup>3</sup> *Stedman v. Smith*, 8 El. & B. 1.

freehold in underlying strata, with a right of access to the same, to work therein and remove the contents.<sup>1</sup>

598. This right in regard to the use of the subjacent strata however, as is above intimated, is not unqualified; on the contrary, it must be exercised, as in removing lateral support, in such a way as not to damage the owner of the surface freehold. What then the plaintiff has to prove in a case of the kind is that, to his damage, his freehold, in its natural condition, has been deprived by the defendant of its necessary support by underground excavation; that being the case, the defendant is liable, however carefully he may have conducted the work in his own freehold. For example: The defendants, a coal mining company, lessees of a third person of coal mines underlying the plaintiff's close, upon which there are no buildings, in the careful and usual manner of working the mine so weaken the subjacent support to the plaintiff's close, without his consent, as to cause the same to sink and suffer injury. The defendants are liable for the damage sustained.<sup>2</sup>

599. It is laid down that there is a difference between rights of support against a subjacent owner of land and an adjacent owner in regard to buildings upon the dominant tenement. The right to the support of Support of buildings. buildings, as has already been observed, depends upon grant, reservation, or (in England) prescription. But as against an underlying freehold, the owner of the surface freehold is entitled, without grant or reservation, to the support of all buildings erected, however recently, before the title of the lower owner began and possession was taken. For example: The defendants are lessees and workers of a mine under the plaintiff's freehold. The plaintiff, at various times before the defendants began their works, and within twenty years thereof, erects buildings above the mines on ground honey-combed by the workings of another company some years be-

<sup>1</sup> *Humphries v. Brogden*, 12 Q. B. 739; *Cases*, 335; *Wilkinson v. Proud*, 11 M. & W. 33.

<sup>2</sup> *Humphries v. Brogden*, *supra*. See *Popplewell v. Hodgkinson*, L. R. 4 Ex. 248; *Jordeson v. Sutton Gas Co.*, 1899, 2 Ch. 217, C. A.

fore. The workings by the defendants increase the defective nature of the ground, and a subsidence of the surface follows; and from this cause and the fact that the plaintiff's buildings were not constructed with sufficient solidity, considering the state of the ground, damage results to the plaintiff's buildings. The defendants have violated their duty to the plaintiff by not shoring up and supporting the overlying tenement.<sup>1</sup>

600. The support required, in the absence of grant or prescription, appears however to be merely a reasonable support. Whether the owner of the upper tenement could require the owner or occupant of the lower to support structures of extraordinary weight, is doubtful. The true view seems to be that when the owner of the whole property severs it by a conveyance either of the surface, reserving the mines, or of the mines, reserving the surface, he intends, unless the contrary be made to appear by plain words, that the land shall be supported, not merely in its original condition, but in a condition suitable to any of the ordinary uses necessary or incidental to its reasonable enjoyment.<sup>2</sup>

601. There is an analogous right of support in respect to the upper stories of houses divided into horizontal tenements.

Upper stories  
of houses:  
vertical sup-  
port. It is laid down that if a building is divided into floors or 'flats,' separately owned, the owner of each upper floor or 'flat' is entitled to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself.<sup>3</sup> The same would (probably) be true if the stories of the building were *leased* to different persons.

<sup>1</sup> Richards *v.* Jenkins, 18 Law T. n. s. 437. Of course, if the buildings would have fallen without the act of the defendants, they would not be liable for the damage to them.

<sup>2</sup> Richards *v.* Jenkins, *supra*. In this case however Mr. Baron Channel inclined to think that, if the buildings were erected *after* the defendants took possession, the period of prescription should elapse before a right to their support could be acquired.

<sup>3</sup> Dalton *v.* Angus, 6 App. Cas. 740, 793; Caledonian Ry. Co. *v.* Sprot, 2 Macq. 449.

## CHAPTER XIV.

### VIOLATION OF WATER RIGHTS.

*Statement of the duty.* A, a riparian proprietor or mill owner, owes to B, a riparian proprietor below, on the same stream, the duty not to take, except for domestic purposes, or for the needs of a mill suited to the size of the stream, anything more than a usufruct of the water thereof.

#### § 1. OF USUFRUCT AND REASONABLE USE OF STREAMS: WHAT MUST BE PROVED, ETC.

602. Riparian proprietors have rights in the water of the streams flowing by or through their lands, which may be thus stated: Each proprietor is entitled to the enjoyment of the water *ex jure naturæ*, as a natural incident to the ownership of the land.<sup>1</sup> And the right is like ordinary property rights in this, that an action may be maintained for an infraction though no actual damage has been sustained.<sup>2</sup> Examples from the authorities just cited will presently appear.

Nature of the  
right: usu-  
fruct: reason-  
able use.

603. There have been some expressions by the courts, and one or two decisions, to the effect that the right to the use of a running stream is absolute, like the right to the enjoyment of land; so that any diminution of the water by an upper proprietor is deemed actionable if he has not a right by grant, or by prescription, just as an entry upon land without license is actionable.<sup>3</sup> And this view has been urged in England.<sup>4</sup>

<sup>1</sup> *Embrey v. Owen*, 6 Ex. 353, 369, Parke, B.

<sup>2</sup> *Id.*; *Sampson v. Hoddinott*, 1 C. B. N. S. 590.

<sup>3</sup> *Wheatley v. Chrisman*, 24 Penn. St. 298. See *Crooker v. Bragg*, 10 Wend. 260.

<sup>4</sup> See the arguments in *Embrey v. Owen*, 6 Ex. 353.



604. The true principle however is that each riparian owner has at least a right of usufruct ('usus-fructus') in the stream, subject to the rights, whatever they may be, of the riparian owners higher up, but that no one can have an absolute right, for any and every purpose, to the whole volume of water. That is, there can be no infraction of the right by any abstraction of water which does not sensibly affect its volume. Without such an act, the usufruct is not interfered with, and the right of other proprietors has not been infringed.<sup>1</sup> It is only for an unreasonable use that an action will lie.<sup>2</sup> To make then a *prima facie* case, the lower proprietor has to prove that the upper proprietor has taken an amount of water from the stream such as has sensibly diminished the current; presumptively that would be unreasonable, unless the plaintiff made his claim as upon a mill-stream.

605. What amounts to an unreasonable use of a stream will vary according to the circumstances of the case. To take a quantity of water from a large stream for agriculture or for manufacturing purposes might cause no sensible diminution of the volume; while taking the same quantity from a small brook passing through many farms would be of great and manifest injury to those below who need it for domestic or other use. This would be an unreasonable use of the water, and an action would lie therefor.<sup>3</sup>

606. The same would be true if a mode of enjoyment quite different from the ordinary one should be adopted, sensibly diminishing the volume of water for any considerable time.<sup>4</sup> For example: The defendant, an upper riparian owner, diverts much water from the stream into a reservoir,

<sup>1</sup> *Embrey v. Owen*, *supra*; *Mason v. Hill*, 2 Nev. & M. 747; s. c. 5 B. & Ad. 1; *Miner v. Gilmour*, 12 Moore, P. C. 131; *Sampson v. Hoddinott*, 1 C. B. N. S. 590.

<sup>2</sup> *Embrey v. Owen*, *supra*.

<sup>3</sup> *Elliot v. Fitchburg R. Co.*, 10 Cush. 191; *Cases*, 352; *Miner v. Gilmour*, 12 Moore, P. C. 131.

<sup>4</sup> *Sampson v. Hoddinott*, 1 C. B. N. S. 590.

and delays it there to supply a factory; this being an extraordinary use of the stream. The act is a breach of duty to the plaintiff, a lower owner.<sup>1</sup> Again: The defendant owns a great tract of porous land adjacent to a stream, the water of which he diverts by canals, in order to irrigate his land, sensibly diminishing the stream. This is a breach of duty to the plaintiff, an owner lower down.<sup>2</sup>

607. These examples illustrate the rule that the action does not require proof of special damage.<sup>3</sup> A stream may be much reduced in size without causing any actual loss to lower proprietors; but the *right* being to a full volume of water, the diminution of the stream in any sensible, material degree by the upper proprietor is an infraction of that right, and accordingly creates liability. If, on the other hand, there is no diminution of the stream when it reaches the plaintiff, there is no liability whatever the abstraction. For example: The defendants erect a dam across a stream and take a considerable part of the water; but the amount so taken is made good by other water which the defendants let into the stream, and the plaintiff in fact sustains no damage. There is no infraction of the plaintiff's right, and no cause of action.<sup>4</sup>

608. Again, every riparian proprietor may use the water of the stream for his natural domestic purposes, including the needs of his animals, and this without regard to the effect it may have, in case of deficiency, upon those lower down.<sup>5</sup> That is, the right is

Special damage not necessary.

Use of stream for domestic purposes.

<sup>1</sup> Wood v. Waud, 3 Ex. 748, 781.

<sup>2</sup> Embrey v. Owen, 6 Ex. 353, 372.

<sup>3</sup> See Harvard Law Rev., Dec. 1899, p. 299.

<sup>4</sup> Elliot v. Fitchburg R. Co., 10 Cush. 191; L. C. Torts, 509. See also Seeley v. Brush, 35 Conn. 419; Chatfield v. Wilson, 31 Vt. 358; Gerrish v. New Market Manuf. Co., 30 N. H. 478, 483; Dilling v. Murray, 6 Ind. 324.

<sup>5</sup> Miner v. Gilmour, 12 Moore, P. C. 131; Wood v. Waud, *supra*; Evans v. Merriweather, 3 Scam. 492, 495; Fleming v. Davis, 37 Texas, 173, 198; Baker v. Brown, 55 Texas, 377.

not limited to the usufruct; the whole may be taken if needed.

**609.** And this leads to the remark that one criterion of liability for abstracting water from streams, used for milling purposes, (probably) is whether, considering all **Mill streams.** the circumstances, the size of the stream and that of the mill-works, there has been a greater use of the stream, in abstracting or detaining the water, than is reasonably necessary and usual in similar establishments for carrying on the mill. A mill-owner is not liable for obstructing and using the water for his mill, if it appear that his dam is of such magnitude only as is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein, and that his mode of using the water is not unusual or unreasonable, according to the general custom of the country in dams upon similar streams; and this, whatever may be the effect upon the owners of land below.<sup>1</sup>

**610.** The water of a stream running wholly within a man's land may be diverted, if it be returned to its natural channel before reaching the lower proprietor;<sup>2</sup> and this **Stream wholly within one's land.** could perhaps be done where the water runs between the lands of riparian occupants, so far as the rights of parties lower down are concerned. The only person entitled to complain of such an act would be the opposite proprietor.

**611.** The foregoing remarks suppose that there exists no right by prescription or grant to the use of the stream by either the upper or lower proprietor. The rights **Prescription or grant.** and burdens of the parties may be greatly varied by grant or by prescription.

<sup>1</sup> *Springfield v. Harris*, 4 Allen, 494; s. c. L. C. Torts, 506. See *Davis v. Getchell*, 50 Maine, 602; *Merrifield v. Worcester*, 110 Mass. 216; *Hayes v. Waldron*, 44 N. H. 580; *Pool v. Lewis*, 41 Ga. 162; *Timin v. Bear*, 39 Wis. 254; *Clinton v. Myers*, 46 N. Y. 511. The statutes with regard to mill-streams should however be noticed.

<sup>2</sup> *Miner v. Gilmour*, supra; *Tolle v. Correth*, 31 Texas, 362.

612. With regard to surface water running in no defined channel, the rule of law is that every occupant of land has the right to appropriate such water, though the result be to prevent the flow of the same into a neighboring stream, or upon the land of an adjoining occupant.<sup>1</sup> Nor can there be any prescriptive right to such water. For example: The defendant, for agricultural and other useful purposes, digs a drain in his land, the effect of which is to prevent the ordinary rainfall, and the waters of a spring arising upon his land, and flowing in no defined channel, from reaching a brook, upon which the plaintiff has for fifty years had a mill. The defendant is not liable for the diversion, however serious the inconvenience to the plaintiff.<sup>2</sup>

Appropriating  
general sur-  
face water.

613. In the Pacific States the law is peculiar. There he who first duly appropriates all the waters of a stream running in the public lands becomes entitled to the same to the exclusion of all others.<sup>3</sup> But if only part is appropriated, another may appropriate the rest; or if all is appropriated only on certain days, others may appropriate it on other days.<sup>4</sup>

First appro-  
priation.

## § 2. OF SUB-SURFACE WATER.

614. In regard to underground streams, if their course is defined and known, as is the case with streams which sink under ground, pursue for a short distance a subterraneous course, and then emerge again, the owner of the land lower down has the same rights as he would have if the stream flowed entirely above ground.<sup>5</sup> But, if the underground water be merely percolation, there

Underground  
streams: mere  
percolation.

<sup>1</sup> Broadbent *v.* Ramsbotham, 11 Ex. 602; Luther *v.* Winnisimmet Co., 9 Cush. 171; Gannon *v.* Hargadon, 10 Allen, 106; Curtis *v.* Ayrault, 47 N. Y. 73, 78; Livingston *v.* McDonald, 21 Iowa, 160, 166.

<sup>2</sup> Broadbent *v.* Ramsbotham, *supra*; Rawstron *v.* Taylor, 11 Ex. 369.

<sup>3</sup> Smith *v.* O'Hara, 43 Cal. 371.

<sup>4</sup> *Id.* As to what is a due appropriation, see Weaver *v.* Eureka Lake Co., 15 Cal. 271; McKinney *v.* Smith, 21 Cal. 374.

<sup>5</sup> Dickinson *v.* Grand Junc. Canal Co., 7 Ex. 282.

can be no breach of duty in cutting it off from a lower or adjoining land-owner. And there can be no prescriptive right to the water. For example: The defendant, a land-owner adjoining the plaintiff, digs on his own ground an extensive well for the purpose of supplying water to the inhabitants of a district, many of whom have no title as land-owners to the use of the water. The plaintiff has previously for more than sixty years enjoyed the use of a stream (for milling purposes) which was chiefly supplied by percolating underground water, produced by rainfall; which water now, after the digging of the well, is cut off and fails to reach the stream. The defendant's act is no breach of duty to the plaintiff.<sup>1</sup>

<sup>1</sup> *Chasemore v. Richards*, 7 H. L. Cas. 349, overruling *Balston v. Bensted*, 1 Camp. 463. No right to such percolating water can arise by grant or by prescription apart from the right to the land itself. *Id.* Further see *Chase v. Silverstone*, 62 Maine, 175; *Wilson v. New Bedford*, 108 Mass. 261; *Frazier v. Brown*, 12 Ohio St. 294; Cases, 360; *Hanson v. McCue*, 42 Cal. 303. In New Hampshire the right to cut off percolating water depends, as by the Roman law, upon the reasonable use of the soil. *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439; Cases, 376. See ante, p. 23, note. As to polluting streams, see post, p. 304.

On the whole subject of the foregoing chapter see *Gould on Waters*, a valuable work.

## CHAPTER XV.

### NUISANCE.

*Statement of the duty.* A owes to B the duty (1) not to obstruct or impair the use of the public ways or waters in such a manner as to cause damage to B; (2) not, except in the ordinary, natural use of his own, to flood the land of B with water collected upon his own land, or by changing the course of currents;<sup>1</sup> (3) not to cause or suffer the existence upon his own premises of anything not naturally there which while there causes damage to B; (4) not to use his own premises so as to endanger the life or impair the health of B, or to disturb B's comfort, to his damage, in the use of his (A's) premises.

Public nuisances are indictable nuisances, being committed (1) in the public ways or waters, or (2) on private premises to the prejudice of the general public.<sup>2</sup>

Private nuisances are non-indictable nuisances, being committed on private premises to the prejudice of one person, or but a few persons, of the neighborhood.

A public nuisance may be also a private nuisance.

#### § 1. OF WHAT CONSTITUTES A NUISANCE.

**615.** It appears to be of the essence of a nuisance that there should be some duration of mischief; a wrong producing damage instantaneously, as in the case

**Nature of  
the wrong.**

<sup>1</sup> But see *infra*, p. 303.

<sup>2</sup> 'If a person erects on his own land anything whatever calculated to interfere with the convenient use of the road, he commits a nuisance.' Stephen, J., in *Brown v. Eastern Ry. Co.*, 23 Q. B. Div. 391, 392, case of a heap of dirt by the roadside. Negligence is not necessary. *Hauck v. Tide Water Co.*, 153 Penn. St. 366; *Cases*, 385; *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588, 600.



of an explosion,<sup>1</sup> could hardly be a nuisance. And then further to determine what constitutes a nuisance, so as to render the author of it liable to a neighbor in damages, a variety of other considerations must often be taken into account; especially where the act in question has been committed in a populous neighborhood, in the prosecution of a manufacturing business. And even if the business itself be unlawful, it does not follow that a private individual can call for redress by way of a civil action for damages. Whether he can do so or not will depend upon the question whether he has sustained special damage, by reason of the thing alleged to be a nuisance.

616. Even supposing the nuisance not to be a public one, that is, not to affect seriously the rights of the public in general, much difficulty arises in determining when the business carried on upon neighboring premises, either in itself or in the manner of conducting it, is so detrimental as to subject the proprietor or manager to liability in damages. And this difficulty was until recently increased by certain inexact terms used in the old authorities. It was said that if a business was carried on in a 'reasonable manner,' an action for damages could not be maintained, though annoyance resulted; and the term 'reasonable manner' was explained as meaning that the business was to be carried on merely in a *convenient* place. That is, a trade was not to be treated as a nuisance if carried on in the ordinary manner in a convenient locality. The result was to bestow upon a manufacturer the right to ruin his neighbor's property, provided only his business was carefully conducted in a locality convenient for its management.<sup>2</sup>

617. Recent authorities have however changed all this, by declaring that, when no prescriptive right is proved, the true meaning of the term 'convenient,' used by the older authori-

<sup>1</sup> An explosion might be a *consequence* of a nuisance however. See *Kinney v. Gerdes*, 116 Ala. 310; *Rudder v. Gerdes*, id. 332. These cases review the authorities as to *keeping* gunpowder in large quantities.

<sup>2</sup> *Comyns's Digest*, Action upon the Case for a Nuisance, C; *Hole v. Barlow*, 4 C. B. N. S. 334.

Reasonable  
manner of  
conducting  
business:  
'convenient  
place.'

ties, lies in the consideration whether the plaintiff has suffered a visible detriment in his property by reason of the management or nature of the defendant's business; if he has, the defendant is liable. Convenience is a question for the neighbor and not for the manufacturer; and visible damage to the neighbor's property shows that the business is carried on in an inconvenient place.<sup>1</sup>

618. The plaintiff accordingly makes a presumptive case against the defendant by showing that the defendant is carrying on a business in the neighborhood of the plaintiff, which has actually and visibly done harm to the plaintiff's property there. For example: The defendants are proprietors of copper-smelting works in the plaintiff's neighborhood, where many other manufacturing works are carried on. The vapors from the defendant's works, when in operation, are visibly injurious to the trees on the plaintiff's estate; the defendants having no prescriptive right to carry on their business as and where they do. The defendants are guilty of a breach of duty to the plaintiff, for which they are liable in damages; though, for the purposes of manufacturing, the business is carried on at a convenient place.<sup>2</sup>

619. But a person living in a populous neighborhood must suffer some annoyance; that is part of the price he pays for the privileges which he may enjoy there. He cannot bring an action for every slight detriment to his property which a business in the vicinity may produce. Or, to state the case in the language of judicial authority, if a man live in a town, he must submit to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public

<sup>1</sup> *Bamford v. Turnley*, 3 Best & S. 62, 66; *Cavey v. Ledbitter*, 13 C. B. N. s. 470; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; Cases, 388.

<sup>2</sup> *St. Helen's Smelting Co. v. Tipping*, *supra*. See also *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; s. c. 7 H. L. Cas. 600.

at large. If a man live in a street where there are numerous shops, and a shop be opened next door to him, which is carried on in a fair and reasonable way, he has no ground of complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that occupation is a visible injury to property, the case is different.<sup>1</sup>

620. It should be observed in this connection that the plaintiff is not precluded from recovering by reason of the fact that he had notice of the existence of the nuisance when he located himself near it. If the thing complained of be unlawful — if there be no prescriptive right to do it — the doer cannot set up notice to escape liability.<sup>2</sup> For example: The defendant is a tallow-chandler, carrying on his business in a certain messuage, in such a manner as to convey and diffuse noxious vapors and smells over premises adjoining, which the plaintiff takes possession of while the defendant is carrying on his business. The defendant is liable.<sup>3</sup>

621. Subject to any annoyance which may result from the right which every landowner has to the ordinary and natural use of his premises, it is held by high authorities that no one may turn water from his own land back upon that of his neighbor without having acquired a right so to do by statute or by grant or prescription;<sup>4</sup> and this though the water thrown back comes of natural rainfall.<sup>5</sup> Such an

<sup>1</sup> Lord Westbury in *St. Helen's Smelting Co. v. Tipping*.

<sup>2</sup> *Bliss v. Hall*, 4 Bing. N. C. 183; *Bamford v. Turnley*, 3 Best & S. 62, 70, 73; L. C. Torts, 467.

<sup>3</sup> *Bliss v. Hall*, *supra*.

<sup>4</sup> *Hurdman v. Northeastern Ry. Co.*, 3 C. P. Div. 168; *Whalley v. Lancashire Ry. Co.*, 13 Q. B. Div. 131; *Tootle v. Clifton*, 22 Ohio St. 247. See also *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Giesemer*, id. 407; *Ogburn v. Connor*, 46 Cal. 346; *Laumer v. Francis*, 23 Mo. 181. Contra, by other authorities. See *infra*.

<sup>5</sup> *Hurdman v. Northeastern Ry. Co.*, *supra*.

act might by these authorities be treated as a trespass, and therefore should be redressible though no damage had been sustained; for otherwise a right to send the water there might eventually be acquired by prescription, to the substantial confiscation of the particular piece of land. For example: The defendant erects an embankment upon his land, whereby the surface-water accumulating upon the plaintiff's land is prevented from flowing off in its natural courses, and caused to flow in a different direction over his land. This is a breach of duty for which the defendant is liable to the plaintiff, though the latter suffer no damage thereby.<sup>1</sup>

622. More clearly than will the flooding of a neighbor's land create liability when damage is caused; indeed, liability is held to be created not only where the water is thrown back by means of a dam, but also where a stream or a ditch is caused to overflow by turning into it water not naturally or entirely tributary to it. For example: The defendant, in the course of reclaiming and improving his land, collects the surface water of his premises into a ditch, and thereby greatly increases the quantity, or changes the manner, of the flow upon the lower lands of the plaintiff, to his damage. The defendant is liable.<sup>2</sup>

623. So far as the doctrine of the two preceding paragraphs applies to surface water, or water flowing through drains or ditches, and not in natural streams, it is rejected by some authorities. By these it is held that a coterminous proprietor may change the surface of his land by raising or filling it to a higher grade, by the construction of dykes or other improvements, though the effect be to bring an accumulation of water on adjacent land,

Surface  
water: drains  
and ditches.

<sup>1</sup> *Tootle v. Clifton*, 22 Ohio St. 247. This, it should be observed, is not the case of bringing water, as by means of a reservoir, upon one's land (*Rylands v. Fletcher*, L. R. 3 H. L. Cas. 330; post, chapter xvii.); for there the purpose is not to throw the water back but to hold it. Escape in such a case might not be a trespass.

<sup>2</sup> *Livingston v. McDonald*, 21 Iowa, 160. A purchaser would be liable for continuing the nuisance, at least after notice.

and to prevent it from passing off. The right to the free use of one's land above, upon, or beneath the surface cannot, it is deemed, be prevented by considerations of damage to others caused in that way, so long as the operations are carried on properly for the end in view.<sup>1</sup>

**624.** If the water of a stream be polluted, or otherwise rendered useless, or perhaps materially less useful than it was before, whether it be surface or sub-surface water, **Polluting water.** and damage ensue to another riparian owner, he can maintain an action therefor, unless a right to do the thing has been acquired by statute or by grant or prescription.<sup>2</sup> In the case of statutory authority to pollute the waters of a stream however this doctrine is to be taken with qualification. It has been laid down in regard to such cases that a city is not liable for polluting by sewage the water of a stream which it has a right to use for that purpose, so far as the effect is the necessary result of the system of drainage adopted by the city; but it is otherwise if the pollution is attributable to the negligence of the city in managing the system or in the construction of sewers,<sup>3</sup> or in any other particular. The right, whether statutory or otherwise, must be exercised in a reasonable and proper way.<sup>4</sup>

**625.** For milling and other purposes, for which some large or special use of the water of a stream is required, statutory rights are often granted, under various restrictions, **Mills.** to flood the lands lying along the mill-streams, or

<sup>1</sup> *Gannon v. Hargadon*, 10 Allen, 106; *Dickinson v. Worcester*, 7 Allen, 19; *Brown v. Collins*, 53 N. H. 443.

<sup>2</sup> *Wheatley v. Chrisman*, 24 Penn. St. 298; *O'Riley v. McCheeny*, 3 Lans. 278; *Merrifield v. Worcester*, 110 Mass. 316. See *Clowes v. Staffordshire Waterworks Co.*, L. R. 8 Ch. 125; *Goldsmid v. Tunbridge Wells Com'rs*, L. R. 1 Eq. 161, affirmed, L. R. 1 Ch. 349.

<sup>3</sup> *Merrifield v. Worcester*, *supra*. See *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, to the same effect in regard to the escape of water.

<sup>4</sup> *Baxendale v. McMurray*, L. R. 2 Ch. 790. The fact that certain works, improperly constructed, in the public highway are satisfactory to the municipal authorities will not prevent them from being a nuisance. *Osgood v. Lynn R. Co.*, 130 Mass. 492.



to foul the water; for the nature of which rights reference should be made to the statutes and the judicial interpretations of them.

626. With regard to actions for nuisances to personal enjoyment, it appears to be quite clear that for such smells or vapors proceeding from a neighbor's premises as are merely disagreeable, at least such smells or vapors as are the necessary effect of a business properly conducted there, no action is maintainable.<sup>1</sup> The noxious gases must produce some important sensible effect upon physical comfort. A person is indeed sometimes said to be entitled to an unpolluted and untainted stream of air for the necessary supply and reasonable use of himself and family; but by the terms 'untainted' and 'unpolluted' are meant, not necessarily air as fresh, free, and pure as existed before the business in question was begun, but air not rendered to an important degree less compatible, or certainly not incompatible, with the physical comfort of existence.<sup>2</sup>

**Bodily comfort: smells and vapors.**

627. The criterion therefore of liability for a supposed (private<sup>3</sup>) nuisance, affecting the bodily comfort of the plaintiff, is whether the inconvenience should be considered as more than fanciful, — more than one to mere delicacy or fastidiousness, — as an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and simple modes of life.<sup>4</sup> On the other hand, it is not necessary that health should be impaired.<sup>5</sup>

<sup>1</sup> See *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

<sup>2</sup> *Walter v. Selfe*, 4 De G. & S. 315.

<sup>3</sup> It is doubtful if the right of action for injury by a public nuisance would stand on different ground; but the court in *Walter v. Selfe* is careful to say that a private nuisance is there spoken of.

<sup>4</sup> *Walter v. Selfe*, *supra*. See also *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588, 600; *Crump v. Lambert*, L. R. 3 Eq. 409; affirmed 17 L. T. N. s. 133; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392.

<sup>5</sup> *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588, 600; *Walter v. Selfe*, *supra*. 'The test is whether the smell is so bad and continuous as to seriously interfere with comfort and enjoyment.' *Lindley, L. J.*, in the first case.



For example: The defendant erects upon his premises, adjoining the premises of the plaintiff, a kiln for the manufacture of bricks, and in the process of the manufacture the smoke and vapors and floating substances from the kiln are constantly directed to and within the plaintiff's house, so as to affect materially the comfort of himself and family as persons of ordinary habits of life. This is a breach of duty to the plaintiff, though it appear that the health of his family has actually been better since the erection of the kiln than before.<sup>1</sup>

628. It matters not what it is that produces the discomfort: smoke alone may be sufficient; so of noxious vapor alone; so of offensive smells alone. Whatever produces a material discomfort to human life in the neighborhood is a nuisance, for which damages are recoverable.<sup>2</sup> But the provisions of statute in regard to such annoyances, arising from the carrying on of a lawful business, should always be examined.<sup>3</sup>

629. Liability for disturbing one's peace of mind appears to be more restricted, and to be confined to acts which would produce a like effect upon all persons, such as acts of indecency. If the disturbance, while affecting the plaintiff's mind disagreeably and seriously, would not so affect the mind of others generally, there is no ground of action. This is deemed to be the case of mere noise on Sunday or during religious worship. For example: The defendant disturbs the plaintiff during divine service in church, by making loud noises in singing, reading, and talking. This is no breach of duty to the plaintiff.<sup>4</sup>

## § 2. OF PUBLIC NUISANCES: WHAT MUST BE PROVED, ETC.

630. Thus far of private nuisances. In regard to public nuisances, it is to be observed that such become private nui-

<sup>1</sup> *Walter v. Selfe*, supra.

<sup>2</sup> *Crump v. Lambert*, supra.

<sup>3</sup> In regard to smoke, under statutory provisions, see *Cooper v. Woolley*, L. R. 2 Ex. 88; *Smith v. Midland Ry. Co.*, 37 L. T. N. S. 224.

<sup>4</sup> *Owen v. Henman*, 1 Watts & S. 548. See also *First Baptist Church v. Utica R. Co.*, 5 Barb. 79; *Sparhawk v. Union Ry. Co.*, 54 Penn. St. 401, cases of public nuisance.

sances as well, by inflicting upon a particular individual any special or particular damage; proof of such damage is enough. For example: The defendant, without authority, moors a barge across a public navigable stream, and harmfully obstructs the navigation thereof to the plaintiff, who at the time is floating a barge down the stream. This is a breach of duty to the plaintiff, for which the defendant is liable in damages.<sup>1</sup>

Public may be private nuisance: special damage.

**631.** If however the discomfort, having the like effect upon all persons, produces no particular, actual damage to any individual, no individual can maintain an action for damages by reason of it. In other words, it is necessary to the maintenance of an action for damages for a public nuisance (as well as in the case of a private nuisance) that the plaintiff should have suffered actual, specific damage thereby,<sup>2</sup> and, by some authorities, damage distinct in kind.<sup>3</sup>

**632.** It matters not that the special damage sustained by the plaintiff is common to a large number of individuals, or to the whole neighborhood; enough if there is actual damage to his property, or injury to his health, or to his physical comfort (as explained in considering private nuisances). The injury inflicted upon private interests is not merged in the wrong done to the general public. For example: The defendants carry on a large business as auctioneers near a coffee-house kept by the plaintiff in a narrow street in London. From the rear of the defendant's building, which there adjoins the plaintiff's house, the defendants are constantly loading and unloading goods into and from vans, and stalling their horses. This intercepts the light of the coffee-house so as to require the plaintiff to burn gas most of the daytime, obstructs the entrance to the door, and renders the plaintiff's premises uncomfortable from stench. The nuisance is a public one, but the plaintiff suffers a special and particular damage from

<sup>1</sup> *Rose v. Miles*, 4 Maule & S. 101; s. c. L. C. Torts, 460. See also *Booth v. Ratté*, 15 App. Cas. 188.

<sup>2</sup> *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Milhau v. Sharp*, 27 N. Y. 612; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Benjamin v. Storr*, L. R. 9 C. P. 400; *Fritz v. Hobson*, 14 Ch. D. 542.

<sup>3</sup> *Shaw v. Boston & A. R. Co.*, 159 Mass. 597, 599.

it for which the defendant is liable to him.<sup>1</sup> Again: The defendants carry on a manufacturing business in such a way as to make themselves liable for causing a public nuisance. The plaintiff's premises are filled with smoke, and his house shaken so as to be uncomfortable for occupation. This is a breach of duty to the plaintiff, for which he is entitled to damages, though every one else in the vicinity suffers in the same way.<sup>2</sup>

**633.** It is however a difficult matter to state what sort of detriment will amount to special damage within the law of public nuisances. It appears to be necessary in the case of obstructions of public ways or waters that a particular user had been begun by the plaintiff, and that such user was interrupted by the wrongful act of the defendant.<sup>3</sup> Before the complaining party has entered upon the actual enjoyment of the public easement, the wrongful act does not directly affect him, or at least does not affect him in a manner to enable a court to measure the loss inflicted upon him. If he desire to make use of the easement, he can complain to the prosecuting officer, and require him to enter public proceedings against the offender; or (so it seems), he may proceed to make his particular use of the easement, and if the obstruction be not removed before he reaches it, or in time for him to have the full enjoyment of passage, he may bring an action for the damage which he has sustained in the particular case by reason of the obstruction.

**634.** This latter proposition follows from the rule of law already noticed, that the plaintiff is not barred of a recovery in damages by reason of having notice of the existence of the nuisance when he put himself in the way of suffering damage from it.<sup>4</sup> Such a case does not come within the principle that a consenting party cannot recover for damage sustained by reason of an act the consequences of which he has invited,<sup>5</sup> since he has not consented to the act complained of, or invited

<sup>1</sup> Benjamin v. Storr, *supra*.

<sup>2</sup> Wesson v. Washburn Iron Co., 13 Allen, 95.

<sup>3</sup> See Rose v. Miles, 4 Maule & S. 101; s. c. L. C. Torts, 460.

<sup>4</sup> Ante, p. 302.

<sup>5</sup> 'Volenti non fit injuria.'

its consequences. He may have reason to suppose that the obstruction will be removed before he reaches it; or, if not, he may well say that it is wrongful, and *must* be removed before he reaches it, on pain of damages for any loss which he may sustain by reason of its continuance.

**635.** If the obstruction of itself be insufficient to cause any actual damage, it is considered that no right of action can be derived by incurring expense in removing it. For example: The defendant obstructs a public footway, and the plaintiff, on coming to the obstruction, in passing along the way, causes the obstruction to be removed; and this is repeated several times. No other damage is proved. The defendant is not liable.<sup>1</sup>

**636.** It follows that the mere fact that the plaintiff has been turned aside by reason of the obstruction and caused to proceed, if at all, by a different route from that intended by him, is not special damage; he must have suffered some specific loss by reason of being thus defeated in his purpose. And this would be true also of obstructions to the public wagon roads. For example: The defendant obstructs a public highway leading directly to the plaintiff's farm, and the plaintiff is thereby compelled to go to his land, if at all, with his team, by a longer and very circuitous road; but no specific loss is proved. The defendant is deemed not liable to the plaintiff.<sup>2</sup>

**637.** The case has been considered to be different if the way were of peculiar use to the plaintiff, as by being his only means of reaching his land with teams. For example: The defendant, by raising the water of his dam, floods a highway and renders it impassable; this highway furnishing the only means of reaching part in use of the plaintiff's farm. The defendant is deemed to be liable.<sup>3</sup>

<sup>1</sup> Winterbottom v. Derby, L. R. 2 Ex. 316.

<sup>2</sup> Houck v. Wachter, 34 Md. 265. Contra, Brown v. Watrous, 47 Maine, 161.

<sup>3</sup> Venard v. Cross, 8 Kans. 248. Sed qu.

## CHAPTER XVI.

### DAMAGE BY ANIMALS.

*Statement of the duty.* A owes to B the duty to prevent his animals (1) from doing damage to B, if A has notice of their propensity to do damage, and (2) to prevent them from straying from his own upon B's premises.

#### § 1. WHAT MUST BE PROVED, ETC.

**638.** Whoever keeps an animal with notice that it has a propensity to do damage is liable to any person who, without fault of his own legally contributing<sup>1</sup> to the injury, suffers an injury from such animal; and this, though the keeper be not guilty of negligence in regard to keeping it properly or securely. The gist of liability for the damage is the keeping of the animal after notice of the evil propensity; proof accordingly makes a presumptive case.<sup>2</sup> For example: The defendant has a monkey, which he knows has a propensity to bite *people*.<sup>3</sup> The plaintiff, without fault of her own, is bitten by the animal. The defendant is liable, however careful he may have been in keeping the monkey.<sup>4</sup>

**639.** If the animal be *feræ naturæ*, it will (probably) be presumed that the defendant had notice of any vicious propensity whereby the plaintiff has suffered injury, since it is

<sup>1</sup> As to this term, see post, pp. 388 et seq.

<sup>2</sup> *May v. Burdett*, 9 Q. B. 101; Cases, 396. See *Jackson v. Smithson*, 15 M. & W. 563; *Card v. Case*, 5 C. B. 622; *Popplewell v. Pierce*, 10 Cush. 509; *Oakes v. Spaulding*, 40 Vt. 347; *Clowdis v. Fresno Irrigation Co.*, 118 Calif. 315.

<sup>3</sup> *Osborne v. Chocquirel*, 1896, 2 Q. B. 109.

<sup>4</sup> *May v. Burdett*, supra.

according to the nature of such an animal to do damage.<sup>1</sup> And even if the animal be domestic, the owner will be presumed to have notice of any propensity which is according to the nature of the animal. For example: The defendant's cattle stray into the plaintiff's garden, and beat and tear down the growing vegetables. The defendant is liable, though not guilty of negligence; since it is of the nature of straying cattle to do such damage.<sup>2</sup>

640. In the case of injuries committed by domestic animals not according to the nature of such animals, it is clear that the owner is not liable if he had no notice that the particular animal had any evil propensity.<sup>3</sup> For example: The defendant's horse kicks the plaintiff, neither the plaintiff nor the defendant being at fault, and the defendant having no notice of a propensity of the horse to kick. The defendant is not liable; since it is not of the nature of horses to kick people, when not provoked to the act.<sup>4</sup>

641. Statutes have been passed, declaring it unnecessary in an action against the owner of a dog to prove notice of a propensity of the animal to injure sheep or cattle. In the absence of statute however the rule requiring notice of the vicious propensity prevails in regard to dogs as well as with regard to other domestic animals.<sup>5</sup>

642. While however negligence in the owner of the animal is not necessary to constitute a breach of duty when the 'scienter' can be proved, negligence in Negligence. the care of the animal will render the owner liable, though he did not know of the propensity.

643. When damage is done by animals upon the *owner's premises*, a different question, or set of questions, may arise.

<sup>1</sup> If a wild animal has been tamed and domesticated, the case may be different. See arguments in *May v. Burdett*, *supra*.

<sup>2</sup> See *Cox v. Burbridge*, 13 C. B. N. S. 430, 438, Williams, J.

<sup>3</sup> L. C. Torts, 490.

<sup>4</sup> *Cox v. Burbridge*, *supra*. The plaintiff was a boy playing in the highway at the time of the injury, but there was no evidence that he had done anything to irritate the horse.

<sup>5</sup> See L. C. Torts, 490.



The case will ordinarily turn upon negligence, and negligence of a special kind, to wit, with reference to the occupancy of premises. The place where the damage was done may enter into the case; a bull may well be left at large in the owner's field, while a savage dog should not be.<sup>1</sup> And then the character in which the person hurt entered the premises will have to be considered in determining the question of duty. Such person may have been 'invited' to enter; he may have been a trespasser; he may have been a bare licensee. The owner of premises obviously owes a duty to persons whom he induces to come there for his benefit, to wit, that they may do so safely so far as his own conduct is concerned; while towards others his duty may be very different. And in all these cases there may be a question of the effect of notice by the occupant, or knowledge by the person injured, of the state of things. For the principles touching such cases the reader must look to that part of the chapter on Negligence, relating to the Use of Premises.<sup>2</sup>

## § 2. OF ESCAPE OF ANIMALS: WHAT MUST BE PROVED, ETC.

**644.** By the common law of England and of most of our States the owner of land is bound to keep it fenced; and if his animals escape and get into his neighbor's premises, he is liable for the very act as for trespass,<sup>3</sup> whether the escape was owing to his negligence or not.<sup>4</sup>

**Duty to fence.**

<sup>1</sup> Loomis v. Terry, 17 Wend. 496.

<sup>2</sup> Chapter xviii., § 10. Section 11, on assuming the risk, should also be noticed.

<sup>3</sup> Ellis v. Loftus Iron Co., L. R. 10 C. P. 10, 13; Lee v. Riley, 18 C. B. N. S. 722. As to dogs see Read v. Edwards, 17 C. B. N. S. 245. Further, see Pollock, Torts, 432, 433, 2d ed.

<sup>4</sup> Myers v. Dodd, 9 Ind. 290; Webber v. Closson, 35 Maine, 26. How strong the common law upon this subject is, is shown by cases applying the rule unhesitatingly to strays from open commons. See Year Book, 20 Edw. 4, 11, pl. 10, where to an action of trespass with cattle the defendant pleaded that his land adjoined a place where he had common, and that his cattle *strayed from the common*, and that he drove them back

Proof of the animal's coming upon the plaintiff's premises is enough. The same is true indeed though the defendant's animals may not have escaped from his enclosure; if still an animal commit damage, by putting part of its body over, through, or beyond the boundary line, the defendant will be liable regardless of negligence. For example: The defendant's horse bites and kicks the plaintiff's horse through the partition fence between the plaintiff's and defendant's premises. The defendant is liable, though not guilty of negligence.<sup>1</sup>

645. The common-law rule however has been variously modified by statute in this country; and in some of the Western States it is held inapplicable to the condition of things.<sup>2</sup>

646. The escape of animals from the highway along which they are being driven or led is a different thing. This latter is not a trespass, that is, a breach of absolute duty; liability on the contrary turns upon negligence on the part of the owner or his servants.<sup>3</sup> Trespassing or straying animals, it may be added, should not be injured unnecessarily in driving them away.<sup>4</sup>

Escape of animals from the highway.

as soon as he could. The plea was held bad, the court saying that if the land in which the defendant had common was not enclosed, he must still keep his beasts there and out of the land of others.

<sup>1</sup> *Ellis v. Loftus Iron Co.*, supra.

<sup>2</sup> *Kent*, Com. iii. 438, note 1, 13th ed.; *Kerwhacker v. Cleveland R. Co.*, 3 Ohio St. 172.

<sup>3</sup> *Goodwin v. Cheveley*, 4 H. & N. 631; *Tillett v. Ward*, 10 Q. B. D. 17, where an ox strayed into a shop.

<sup>4</sup> Ante, p. 246.

## CHAPTER XVII.

### ESCAPE OF DANGEROUS THINGS.

*Statement of the duty.* A owes to B the duty (by the law of England) to prevent the escape of any dangerous thing, to the damage of B, brought or made upon the premises of A; the escape being due to defects within the control, though it may be not within the knowledge, of A.

#### § 1. OF THE NATURE OF THE PROTECTION REQUIRED: WHAT MUST BE PROVED, ETC.

647. The duty considered in the preceding chapter of restraining animals from doing damage has been treated in England as furnishing ground for an analogous duty with reference to inanimate things of a peculiarly dangerous character, which the occupant of premises has brought or made thereon, — the duty, to wit, so to keep such things that they shall not do mischief to the occupant's neighbor. Proof of the escape of the dangerous thing, to the damage of the plaintiff, makes a presumptive right of action.

**Analogy to  
damage by  
animals.**

648. But the rule is not to be taken without caution. It is laid down that where the owner of land, without negligence or other misconduct, uses his land in the ordinary manner, he will not be liable in damages, though mischief should thereby be occasioned to his neighbor.<sup>1</sup> Still a person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must, by the law of England, keep it there at his peril; and if he does not, he will be answerable, *prima facie*, for all the damage which is the natural consequence of its escape; and this however care-

**Use of land in  
ordinary man-  
ner: mines  
and reser-  
voirs.**

<sup>1</sup> *Chasemore v. Richards*, 7 H. L. Cas. 349. As to malice see *id.* 388, and ante, pp. 22, 23.

ful he may have been, and whatever precautions he may have taken to prevent the damage.<sup>1</sup> For example: The defendants construct a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir, and under part of the intervening land, have been formerly worked; and the plaintiff has, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It has not been known to the defendants, or to any person employed by them in the construction of the reservoir, that such communication exists, or that there have been any old workings under the site of the reservoir; and the defendants have not been personally guilty of any negligence. The reservoir is in fact, but without the defendants' knowledge, constructed over five old shafts, filled with rubbish and other loose material, and leading down to the workings; and the reservoir having been filled with water, the water bursts down these shafts and flows by the underground channel into the plaintiff's mines, producing damage. The defendants are liable.<sup>2</sup>

<sup>1</sup> *Rylands v. Fletcher*, L. R. 1 Ex. 265, Ex. Ch.; L. R. 3 H. L. 330; Cases, 405. The decision of the Court of Exchequer (3 H. & C. 774) was reversed. See *National Telephone Co. v. Baker*, 1893, 2 Ch. 186.

<sup>2</sup> *Rylands v. Fletcher*, supra. See *National Telephone Co. v. Baker*, 1893, 2 Ch. 186. The general rule above stated has been the subject of great discussion on both sides of the Atlantic, since *Rylands v. Fletcher* was decided. It has been denied by some of the American courts, and adopted or favored by others. It is denied by *Losee v. Buchanan*, 51 N. Y. 476, by *Cumberland Telephone v. United Electric Co.*, 42 Fed. Rep. 273, by *Brown v. Collins*, 53 N. H. 442, and by *Marshall v. Melwood*, 38 N. J. 339; it is favored by *Shipley v. Fifty Associates*, 106 Mass. 194, *Baltimore Breweries Co. v. Ranstead*, 28 Atl. Rep. 273 (Md.), and other cases. See further L. C. Torts, 497-500. Some tendency to modify it has been shown in England, but that is as much as can be said. *Ponting v. Noakes*, 1894, 2 Q. B. 281, noxious trees on and wholly within one's land. In substance the rule stands. See *Pollock*, Torts, 421-428, 2d ed. 'The authority of *Rylands v. Fletcher* is unquestioned, but *Nichols v. Marsland* [L. R. 10 Ex. 255, 2 Ex. Div. 1] has practically empowered juries to mitigate the rule, whenever its operation seems too harsh.' *Id.* p. 428, 2d ed.

649. The owners of the upper tenement have however, as has already been intimated, in such cases, a right to work their premises in the ordinary, reasonable, and proper manner, and are not liable for the effects of water which flows down into the lower tenement by mere force of gravitation. But where some unusual and extraordinary effort is put forth for effecting the occupant's purpose, the owner is liable for the injurious results which follow.<sup>1</sup> For example: The defendant, owner of a coal-mine above the plaintiff's mine, works out the whole of his coal, leaving no barrier between his mine and the plaintiff's, the consequence of which is, that the water percolating through the upper mine flows into the lower one, and obstructs the plaintiff in getting out his coal. This is no breach of duty by the defendant; the water having flowed down in its natural course, and the defendant being entitled to remove all his coal.<sup>2</sup> Again: The defendant, under the like circumstances, does not merely suffer the water to flow through his mine in its natural way, but, in order to work his mine beneficially, pumps up quantities of water which pass into the plaintiff's mine, in addition to that which would naturally have reached it, whereby the plaintiff suffers damage. This is a breach of duty to the plaintiff, though it is done without negligence and in the due working of the defendant's mine.<sup>3</sup>

650. If the damage be produced by vis major or by the act of God,<sup>4</sup> or otherwise, without the intervention of acts or omission of duty by the occupant or those for whom he is responsible, the case will be different. In the example given, if the damage had been caused by lightning bursting the reservoir,<sup>5</sup> and not by reason

Damage by  
vis major or  
act of God.

<sup>1</sup> Rylands v. Fletcher, *supra*; Fletcher v. Smith, 2 App. Cas. 781; Baird v. Williamson, 15 C. B. N. S. 376.

<sup>2</sup> Smith v. Kenrick, 7 C. B. 515, 564.

<sup>3</sup> Baird v. Williamson, *supra*.

<sup>4</sup> Nichols v. Marsland, L. R. 10 Ex. 255; s. c. 2 Ex. Div. 1, showing that this term includes events which human foresight could not *reasonably* anticipate. This case in both stages is very instructive.

<sup>5</sup> Rylands v. Fletcher, L. R. 3 II. L. 330; Cases, 405.

of the existence of the openings into the lower mines, the defendants would not have been liable. Again: The defendant's tenants, the plaintiffs, occupy the lower story of a warehouse, of which the defendant occupies the upper. A hole has been gnawed by rats through a box into which water from the gutters of the building is collected, to be thence discharged by a pipe into the drains. The water, now pouring through the hole, runs down and wets the plaintiff's goods. The defendant is not liable.<sup>1</sup> Again: The defendant owns premises on which stand yew-trees, which to his knowledge are poisonous. A third person clips some of the branches, which fall upon the plaintiff's land, and poison the latter's horses. The defendant is not liable.<sup>2</sup>

651. Again if the bringing the dangerous thing upon the occupant's land, and all the works connected therewith, be effected under sanction of legislative authority, the fact that they result in damage to the party's neighbor by purely natural escape or by authorized channels, and not by reason of negligence attributable to the occupant, will not render the occupant liable.<sup>3</sup> It is also certain, a fortiori, in such a case, that, if the escape be caused by the act of God, no liability follows. For example: The defendant is charged by law with the duty of maintaining water tanks in his district for purposes of irrigation, as part of a national system of irrigation, for the welfare of the people. By reason of an extraordinary flood, and not by reason of the bad condition of the works, one of these tanks gives way, causing damage to the plaintiffs. The plaintiffs cannot recover therefor.<sup>4</sup>

652. On the other hand, if the works be of a nature to require legislative sanction, the proprietor or manager, when

<sup>1</sup> *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Ross v. Fedden*, L. R. 7 Q. B. 661. See *Doupe v. Genin*, 45 N. Y. 119. But see *Marshall v. Cohen*, 44 Ga. 489.

<sup>2</sup> *Wilson v. Newberry*, L. R. 7 Q. B. 31.

<sup>3</sup> See *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679.

<sup>4</sup> *Madras Ry. Co. v. The Zemindar*, L. R. 1 Ind. App. 364.



not having it, will be liable for damage produced by any escape or breaking thereof, however occurring. For example: The defendants make use of locomotive engines, without having obtained the necessary authority of law, and the plaintiff suffers damage by reason of fire proceeding from the same. The defendants are liable, though not guilty of any negligence in the management of the engines, and though they would not have been liable had they had the proper authority.<sup>1</sup>

## § 2. OF THE AMERICAN LAW.

653. The foregoing is the law of England. The American law cannot be said as yet to have become settled in regard to this subject. The authorities are conflicting; but the tendency appears to be towards the English doctrine — making the keeper of *certain* things naturally dangerous a virtual insurer, presumptively, against harm from them.<sup>2</sup>

654. It has been laid down accordingly in this country, that one who knowingly keeps large quantities of nitro-glycerine, dynamite, or gunpowder on one's premises must keep it from doing harm by explosion, though one complies with the law regulating such things and is not guilty of negligence.<sup>3</sup> So too it has been decided that the occupant of premises may be liable for damage caused by the fall of ice or snow from the roof of his building when the roof is so constructed as to make it substantially certain that, if the snow be not removed, accidents from snow-slides will occur; although the roof be constructed in the usual manner of the time.<sup>4</sup> And with

American law  
not settled:  
points de-  
cided.

<sup>1</sup> Jones v. Festiniog Ry. Co., L. R. 3 Q. B. 733; Vaughan v. Taff Vale Ry. Co., supra.

<sup>2</sup> Bradford Glycerine Co. v. St. Mary's Woolen Co., 45 L. R. A. 658 (Ohio); Kinney v. Gerdes, 116 Ala. 310; Rudder v. Gerdes, id. 332; Shipley v. Fifty Associates, 106 Mass. 194; Wilson v. New Bedford, 108 Mass. 261. Contra, Losee v. Buchanan, 51 N. Y. 476. See Harvard Law Rev., March, 1900, p. 600. The Alabama cases however put the wrong as one of nuisance.

<sup>3</sup> Bradford Glycerine Co. v. St. Mary's Woolen Co., supra.

<sup>4</sup> Shipley v. Fifty Associates, 106 Mass. 194; Fitzpatrick v. Welch,

regard to water collected in reservoirs, it is held that the embankments must be so thoroughly constructed that the water cannot percolate through them.<sup>1</sup>

655. The doctrine has also been laid down that where the alleged rights of adjoining landowners conflict, it is better that one of them should yield to the other and forego a particular use of his land, rather than, by insisting upon that use, deprive the other altogether of the use of his property; which might often be the consequence of carrying on the operation. This would of course be an obvious principle if stated with regard to a nuisance; but it is treated as applicable to other wrongs as well. For example: The defendants, in the course of digging a canal through their land, for which purpose they are clothed with legislative authority,<sup>2</sup> find it necessary to blast rocks by the use of gunpowder. The result of the blasting is to throw fragments of rock against the plaintiff's house, whereby the plaintiff suffers damage. The defendants are deemed liable, though not guilty of negligence.<sup>3</sup>

656. A distinction has however been declared to exist between an injury sustained in that way, and one sustained by the explosion of a boiler on the defendant's premises. For damage sustained in the latter way, it is deemed that no right of action arises unless the explosion was due to negligence of the manager.<sup>4</sup> The use of a boiler is not necessarily dangerous.<sup>5</sup>

174 Mass. 486. But in some States it is enough that ordinary care was exercised. *Underwood v. Waldron*, 33 Mich. 232, 238; *Garland v. Towne*, 55 N. H. 55.

<sup>1</sup> *Wilson v. New Bedford*, 108 Mass. 261; *Pixley v. Clark*, 35 N. Y. 520.

<sup>2</sup> The work could not therefore be a nuisance when carefully conducted.

<sup>3</sup> *Hay v. Cohoes Co.*, 2 N. Y. 159.

<sup>4</sup> *Losee v. Buchanan*, 51 N. Y. 476. In this case the rule in *Rylands v. Fletcher*, *supra*, is denied.

<sup>5</sup> Further, see *Cooley*, Torts, 677, 680, 2d ed.; *L. C. Torts*, 496 et seq.



PART III.

EVENTS CAUSED BY NEGLIGENCE.

BREACH OF DUTY TO REFRAIN FROM  
NEGLECT.



## CHAPTER XVIII.

### NEGLIGENCE.

*Statement of the duty.* A, seeing or knowing, or being in a situation to see or know, that acts or omissions of his, in failing to exercise ordinary care, skill, or diligence towards B, or, in matters of care, skill, or diligence, to show ordinary regard for B's rights, in a particular place or juncture, will be apt to do harm to B, owes to B the duty not to be guilty of such acts or omissions, to the damage of B.

The foregoing is a statement of duty, not for negligence universally, but for its more common forms. It would be impracticable to go further without making the statement prolix.

Like fraud and malice, negligence is only an element of tort, not itself a tort; it is wrongful, but not alone a wrong.<sup>1</sup>

Unlike fraud and malice, negligence is not represented by a number of torts having names of their own; its origin in the law is too modern for that.

In some States the statement of duty would need the modification, that the plaintiff must show that he was not in contributory fault in the case.

The fundamental distinction between the wrongs of Part I. and Part II. on the one hand, and those of Negligence on the other, has been stated in treating of General Theory and Doctrine. The consequences complained of in the first two divisions are immediate, or begin immediately, upon the wrongful act or omission; the consequences complained of in negligence do not usually follow at once upon the wrongful act or omission, and they are never intended.<sup>2</sup>

<sup>1</sup> Ante, p. 5, note.

<sup>2</sup> Ante, pp. 12, 13. Of course a man *might* intend the harmful consequences of his negligence; but the case would then belong to the category of intended wrongs. And to make a case for that category, where



## § 1. WHAT MUST BE PROVED, ETC.

657. A man may sustain damage by reason of the negligence of another, and yet have no right of action for the same. Another element is necessary; namely, that the defendant owed a duty to the *plaintiff* not to be negligent.<sup>1</sup> The rule is not peculiar to negligence,<sup>2</sup> but it needs emphasis here. Negligence, breach of duty to the plaintiff, and damage, are then the essential elements of the right of action. In many cases the duty will be obvious on the general facts, and hence will not call for special consideration; in other cases it will not be obvious that there was a duty, or what the nature of the duty was. Such cases will call for examination of the question.

658. The result is, that it will be necessary to consider, first, the meaning of 'negligence,' as applicable to all cases in general, and, secondly, assuming negligence, whether the negligence (and damage) amounted to a breach of duty to the plaintiff. Damage, as a question of law, will be considered in the closing sections of the chapter.

## § 2. OF THE LEGAL CONCEPTION OF NEGLIGENCE IN GENERAL.

659. Negligence in the law is a technical term, and a complex conception. Conduct is considered negligent in law which might not be considered negligent in the popular acceptance of the term. Indeed the popular understanding is too apt to make its way, in unguarded or mistaken language, into the law books, — some special phase of the subject in its technical sense being spoken of perhaps as something other than negligence.

the consequence was not, at least in part, immediate, it would be necessary to prove that the result was intended. Hence, as was said on p. 13, the immediateness or not of the result is material; all the difference, on the criminal side, between manslaughter and murder is involved.

<sup>1</sup> *Membury v. Great Western Ry. Co.*, 14 App. Cas. 179, 190.

<sup>2</sup> *Ante*, p. 25.

**660.** The significance of this will be seen when it is said that negligence, in the eye of the law, embraces not merely want of care, its more familiar form, and thoughtlessness, but rashness and wantonness, in other words, danger known but disregarded or not heeded.<sup>1</sup> And well enough; for what are rashness and wantonness but failure, in presence of danger, to respond to the prompting of judgment or conscience, which, in the one case (rashness), would not tolerate overconfidence, and, in the other (wantonness), want of ordinary regard for another's rights?<sup>2</sup> Plainly that would be negligence. But rashness and wantonness stand upon a special footing in certain cases, sometimes creating liability, as will later appear, when negligence in the more common form would not.<sup>3</sup> That fact, no doubt, has caused judges and writers on law, now and then, too readily to consider rashness as not negligence at all.<sup>4</sup>

**661.** Legally speaking then, negligence in common form, as a tort, imports misconduct causing unintended harm,<sup>5</sup> the misconduct consisting in a failure to respond to judgment or conscience according to ordinary standards of conduct.

**662.** Still, it should be distinctly observed that the law acts, or refuses to act, in accordance with the *manifestation* of conduct; in no case does it inquire into the defendant's

<sup>1</sup> See *Claridge v. So. Staffordshire Tramway Co.*, 1892, 1 Q. B. 422, fast driving; *Maynard v. Boston R. Co.*, 115 Mass. 457. Rashness, recklessness, and wantonness are words applied indifferently, in many cases, to danger known but not heeded; but rashness properly is overconfidence, and recklessness or wantonness, disregard of another's rights. See for instance *Southern Ry. Co. v. Bush*, 122 Ala. 470; *Louisville R. Co. v. Orr*, 121 Ala. 489; *Louisville R. Co. v. Brown*, id. 221; *Abrahams v. Los Angeles Traction Co.*, 124 Calif. 411. All three approach, but still fall short of, intentional wrongdoing. They are however treated as evidence of malice and trespass as well as of negligence. See ante, pp. 21, 22, 184, 189. Rashness and recklessness are also evidence in deceit, on the allegation of fraud. See ante, p. 69.

<sup>2</sup> If the function itself is so dulled as not to speak, it is a case of mental derangement, more or less, and may not be negligence.

<sup>3</sup> See post, p. 356.

<sup>4</sup> See e. g. *Smith v. Baker*, 1891, A. C. 325, 347, Lord Bramwell.

<sup>5</sup> Ante, p. 13.

attitude of mind to determine whether he was guilty of negligence. In this legal conception of it, as manifestation, negligence may consist in acts as well as in omissions, as follows from what has already been said.

**663.** Further, negligence may relate either to things seen or known, or to things unseen or unknown; a man may fail in duty by ignorance, when his negligence may be called 'passive' negligence, as well as by knowledge, when his negligence may be called 'active' negligence.

**664.** Negligence in its common form as a tort may now be defined thus: It consists in failure to conform (1) to the conduct of a prudent, careful, skilful, or diligent man (or *and* diligent man), or (2), in cases calling for prudence, care, skill, or diligence, to the conduct of a man having ordinary regard for the rights of others, — or putting the two cases together, to the conduct of the ordinary or average man,<sup>1</sup> in matters of prudence, care, skill, or diligence, — in the particular situation; and if that failure is a breach of duty to one who sustains damage thereby, that person has a right of action.

**665.** Liability *ex delicto* for the consequences of negligence as regarded by the law arises however by reason only of acts, or omissions after the doing of acts. In respect of omissions not preceded at any time by overt acts, either by the defendant or by his predecessors in interest, in connection with that which occasions the damage, there may indeed be liability *ex contractu* (the omission being a breach of contract); there can be no liability in tort as for negligence. An innkeeper may be liable for refusing to receive a man as guest into his inn; but the liability incurred cannot properly be treated as growing out of negligence.

<sup>1</sup> Other terms are 'fair man,' 'man of average intelligence,' 'man of ordinary intelligence or care, skill, or prudence,' and the like, according to the particular case.

666. There can arise indeed no civil liability for the negligent omission to do a thing required by law, though commanded by the Legislature, unless that neglect be connected with the existence of something already done. A town may be required to build a bridge across a stream, but no one can maintain an action for damages against the town for neglecting, however inexcusably, to build the bridge; though an action might be maintained for damage caused by the breaking of a bridge through failure to repair it, if the town was bound to keep it in proper condition. In the latter case, there is an omission preceded (at some time) by an overt act; to wit, the building of the bridge. When it is said that no action *ex delicto* can be maintained for a pure non-feasance, consisting in neglect of duty, the former sort of case is to be understood as intended.

Omission  
alone.

667. It is declared by all the authorities that the standard by which to determine whether a person has been guilty of negligence in common form is the conduct of the defendant in the particular situation. But, if not properly understood, this standard may itself be misleading. A blacksmith finds a watch by the roadside, and on opening it and seeing that it is full of dirt, attempts to clean it, when a watchmaker is near; but in doing so, though exercising, it may be, the greatest care, he injures it by reason of his lack of skill. Now in attempting to put the watch in order, and thus perhaps preventing its ruin, he has done nothing that a prudent man might not have done; and, taking the criterion in its broadest sense, the blacksmith could not be liable to the owner of the watch for the damage which he did to it; while the law would probably be just the contrary.<sup>1</sup>

Standard of  
liability.

668. A prudent *blacksmith* however would not have undertaken to put the watch in order; he would have taken it to the watchmaker. The prudent man, ordinarily, with regard to *undertaking* an act, is the man who has acquired the skill to do the act which he undertakes; a man who has not

<sup>1</sup> It is to be noticed that as a watchmaker is near, the act could not be considered one of necessity.

acquired that special skill is imprudent in undertaking to do the act, however careful he may be, and however great his skill in other things.<sup>1</sup>

**669.** The criterion then of the conduct of the defendant in the undertaking of an act is to be understood with the limits suggested. The question to be raised with regard to a man's conduct brought in question in such a case is, whether an ordinary or average man of his calling or business or skill would have undertaken to do the thing in question; supposing the party to have exercised due care in executing the work undertaken.

**670.** When an act has been undertaken by a person whose business or profession covers the doing of acts of the kind in question, the question to be decided is, whether that skill or care or diligence has been exercised which a man of the same business would have exercised in the same situation.

**671.** In regard to omissions (after overt acts) to perform acts not distinctly and certainly required by law, the question of the duty to perform them is to be decided by the general practice of prudent or careful or diligent men of the same occupation, when such a practice exists. When no such general practice exists, as perhaps in regard to the use of fire-arms or other dangerous weapons,<sup>2</sup> the question is decided upon the reason-

<sup>1</sup> See *Dean v. Keate*, 3 Campb. 4.

<sup>2</sup> The rule in early times in regard to such cases seems to have been that the defendant had to exempt himself from liability for the damage done, if he could, by showing that the misfortune happened entirely without his will, or at least without his fault. See *Year Book*, 21 Hen. 7, 28 (shooting at butts); *Weaver v. Ward*, Hob. 134; *Lambert v. Bussey*, T. Raym. 421. But the rule has changed in conformity with modern theories of civil liability, as shown ante, p. 190, and the test now is of negligence as in other cases. *Nitro-Glycerine Case*, 15 Wall. 524; *Moebs v. Becker*, 46 N. J. 41; *Winans v. Randolph*, 169 Penn. St. 606; *McCleary v. Frantz*, 160 Penn. St. 535; *Scanlon v. Wedger*, 156 Mass. 462; *Glueck v. Scheld*, 125 Calif. 288; *Stanley v. Powell*, 1891, 1 Q. B. 86. See also *Dixon v. Bell*, 5 Maule & S. 198; *Cases*, 435. Greater care will be required in the use of such weapons than in that of things not dangerous; but the question still is of the conduct of the prudent man in using them, and that question is one of fact. *Moebs v. Becker* and *McCleary v. Frantz*, supra.

Note then the distinction between the firing off a gun, and such cases,



ably supposable conduct, higher or lower, of the prudent man, according to the circumstances or the nature of the case.<sup>1</sup>

**672.** In the more common cases, such as actions for damage to property or for bodily injuries caused by collisions, the falling of timbers or other materials, or of build-  
ings, unguarded excavations or openings, obstruc-  
tions in the highway, blasting, explosions, fires, and run-  
aways, and endless other 'accidents' so-called, — in common cases such as these the question actually put to the jury or to the judge for decision is whether the defendant was in the exercise of due or reasonable care at the time of the misfortune. Other questions may be involved; but the question of the defendant's negligence is always fundamental, and usually takes the form stated.

Due or reasonable care.

**673.** A remark should be made upon the question whether the conclusion or inference to be drawn from the facts in the case of an action for negligence is a matter of law or of fact. The authorities do not give any categorical answer to the question, but this appears to be the effect of them: Where the facts are found, and it is manifest, beyond ground for question, that a prudent man would or would not act or omit to act as the defendant has done, the conclusion or inference may be considered a matter of law. This is true whether the question be one of negligence in the defendant or contributory negligence,<sup>2</sup> negligence in the plaintiff.<sup>3</sup> The same is also true where the

Province of court and jury.

as explosions of nitro-glycerine or the bursting of reservoirs of the chapter preceding. Ante, pp. 315, 318.

<sup>1</sup> See *Mulligan v. New Britain*, 69 Conn. 96; *Uggla v. West End Ry. Co.*, 160 Mass. 351; *Ellis v. Lynn R. Co.*, id. 341.

<sup>2</sup> The so-called 'look and listen' rule in regard to crossing steam or electric railways is an example. *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379; *Cawley v. La Crosse Ry. Co.*, 101 Wis. 145. The rule is not accepted everywhere. *Atlantic City R. Co. v. Goodin*, 45 L. R. A. 671 (N. J.). See *Harvard Law Rev.*, Nov. 1899, p. 226; post, p. 393.

<sup>3</sup> 'We are of opinion,' said Mr. Justice Brewer, in *Elliott v. Chicago Ry. Co.*, 150 U. S. 245, 246, 'that the deceased was guilty of contribu-



law has prescribed, as in some cases it has,<sup>1</sup> the nature of the duty, and also where there exists a well-known practice in the community, of a proper character; in such cases the standard of duty is fixed in regard to the very conduct to be pursued, — given the facts, and the conclusion is of law. In other and more numerous cases the conclusion or inference is one of fact.<sup>2</sup>

**674.** It should further be stated that a very large part of the litigation pertaining to suits for negligence turns upon the question whether the facts submitted to the court make a case which may be submitted to the jury, in jury trials, as furnishing evidence upon which negligence may properly be found. To consider such questions would require a detailed examination of the authorities beyond the purpose of this book.

**675.** Thus far of what may be called the ordinary doctrine of negligence, or negligence in common form, where the relation of the defendant to the plaintiff is merely  
**Special cases.** that of man to man, no contract between the par-

tory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, Milwaukee, & St. Paul Railroad*, 114 U. S. 615; *Delaware, Lackawanna, etc. Railroad Co. v. Converse*, 139 U. S. 469; *Aerkfet v. Humphreys*, 145 U. S. 418.' But if reasonable men might differ, the question is for the jury. *Warner v. Baltimore R. Co.*, 168 U. S. 339.

<sup>1</sup> Thus in some States trustees in making investments of funds must invest them in first mortgages of real estate, or in government securities, unless the instrument (if any) creating the trust otherwise prescribes or permits. See *Hemphill's Estate*, 18 Penn. St. 303. Practice or advice of others, however competent, would not excuse any departure from the requirement, in the absence of extraordinary circumstances. The rule just stated in regard to the funds in which investment should be made is not universal. *New England Trust Co. v. Eaton*, 140 Mass. 532, 535; *Brown v. French*, 125 Mass. 410. See post, pp. 349, 350.

<sup>2</sup> See *L. C. Torts*, 589-596.

ties existing to modify the general doctrine, or to direct it into any particular channel, and no special situation or office affecting it in law. Several classes of cases will now be considered in which the relation of the parties is more or less affected by contract or by law, the general standard of liability being more or less affected accordingly, or superseded altogether; these to be followed by cases in which the question is whether the defendant owed any duty to the plaintiff.

*omit to § 679.*  
§ 3. OF INNKEEPER AND GUEST.

**676.** With regard to the duties of innkeepers, it will be almost sufficient in the present connection to say that, though it has sometimes been considered that for loss or damage to the goods of guests liability depends Negligence. upon the question of negligence in the host, or in his servants acting for him,<sup>1</sup> it is now more generally considered that an innkeeper's liability for the failure to keep the goods of his guest safely, when once delivered into the former's custody, arises independently of the question of negligence. The host is now held liable for damage to or loss of the goods put in his custody, though he exercise the greatest diligence in the care of them, unless the loss occur by the guest's negligence, or by vis major, inevitable accident, or the act of God.<sup>2</sup>

**677.** It follows, a fortiori, that the innkeeper is liable in case of loss sustained by reason of his own negligence, or that of his servants; but, inasmuch as the question of his liability

<sup>1</sup> Dawson v. Chamney, 5 Q. B. 164; Merritt v. Claghorn, 23 Vt. 177; Metcalf v. Hess, 14 Ill. 129.

<sup>2</sup> Armistead v. Wilde, 17 Q. B. 261; Cashill v. Wright, 6 El. & B. 891; Morgan v. Ravey, 6 Il. & N. 265; Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515; Shaw v. Berry, 31 Maine, 478; Norcross v. Norcross, 53 Maine, 163; Sibley v. Aldrich, 33 N. H. 553; Manning v. Wells, 9 Humph. 746; Thickstun v. Howard, 8 Blackf. 535; Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Cohen v. Frost, 2 Duer, 341; Piper v. Manny, 21 Wend. 282; Hulett v. Swift, 33 N. Y. 571; Wilkins v. Earle, 44 N. Y. 172; Houser v. Tully, 62 Penn. St. 92; Rockwell v. Proctor, 39 Ga. 105. But this subject is much regulated by statute.

does not turn upon the proof of negligence in the ordinary sense, the subject need not be here pursued.

**678.** It is proper however to mark the fact in this connection that a question of contributory negligence<sup>1</sup> may arise in considering cases of innkeeper and guest, as well as in other cases. If the negligence of the guest occasion the loss in such a way that it would not have happened if the guest had exercised the usual care that a prudent man might reasonably be expected to have taken under the circumstances, the innkeeper is not liable.<sup>2</sup>

#### § 4. OF BAILOR AND BAILEE.

**679.** So much of the subject of bailment as relates to breaches of duty by common carriers may be dismissed with a brief word. The liability of a common carrier **Negligence.** is similar to that of an innkeeper, and does not turn upon the question of negligence, the subject of the present chapter. And there are other cases in which the bailor of an article for special use, as a 'job-master' of carriages, while not for all purposes an insurer, is still liable, at least in England, for loss happening without negligence in the ordinary sense.<sup>3</sup> These too fall without the present subject.

**680.** It was long considered a settled doctrine of the English law that the duty of bailees was to be distributed **Degrees of negligence.** under three heads, having reference respectively to the nature of the bailment; to wit, (1) the duty to observe very great care, (2) the duty to observe ordinary care, and (3) the duty to observe slight care only. Conversely therefore the bailee was deemed to be liable for

<sup>1</sup> Post, § 12.

<sup>2</sup> *Cashill v. Wright*, 6 El. & B. 891; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515.

<sup>3</sup> See e. g. *Hyman v. Nye*, 6 Q. B. D. 685. The liability of one whose business is to let carriages is here put upon the footing of coach proprietors and railway companies. 'He is an insurer against all defects which care and skill can guard against.' *Id.* *Lindley, J.* He is not an insurer against all defects absolutely. *Id.*

loss sustained by the bailor, under the first head, if the bailee were guilty of slight negligence; under the second head, if he were guilty of 'ordinary negligence,' or rather of negligence of an intermediate grade; and, under the third head, if he were guilty of gross negligence.<sup>1</sup>

**681.** The application of these three degrees of negligence was thus explained: If the bailment were gratuitous, by the bailor, that is, for the sole benefit of the bailee, the bailee was deemed to be liable for loss or damage to the subject of the bailment occasioned even by slight negligence on his part. If the bailment were for hire, that is, for the mutual benefit of the bailor and the bailee, he was deemed to be liable for the consequences of negligence of an intermediate grade only. If the bailment were without benefit to the bailee, that is, if the bailor had requested the bailee to take care of his, the former's, goods without reward, the bailee was deemed to be liable for the result of gross negligence only.<sup>2</sup>

**682.** This doctrine arose from a misconception apparently of the Roman law, the doctrines of which were resorted to in order to assist in the solution of a question which arose in England in the eighteenth century.<sup>3</sup> But it remained in the English law unchallenged for so long a time that it has not been readily abandoned, and it may be still considered as retaining some faint vitality in England and in various parts of the United States.

**683.** The tendency of authority for a considerable time has been to break away from this division of negligence, and to accept substantially what seems to have been the true doctrine of the Roman law in regard to bailments, as well as in relation to other subjects covered by the title Negligence. The effect is to make the criterion of

Roman law  
misunder-  
stood.

Tendency of  
authority.

<sup>1</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L. C. 188, 7th ed.

<sup>2</sup> *Id.*

<sup>3</sup> *Coggs v. Bernard*, *supra*. Lord Holt took his Roman law mainly from the mediæval jurists, or glossarists. Wharton, *Negligence*, § 57 et seq.; Smith, *Negligence*, 11 et seq., 2d ed.

liability to depend upon the consideration already adverted to, whether the party complained of conducted himself in the particular situation as a man of prudence or carefulness or skill, of the same business, would have conducted himself, or as prudent or careful or skilful men, of the same business, generally do conduct themselves in the like situation.<sup>1</sup>

684. This criterion indeed will often if not generally be found to be the real test applied in those cases in which the old terms are used. For example: The defendant, a bailee of money to keep without reward, gives the following account of himself: He was a coffee-house keeper, and had placed the money in question in his cash-box in the tap-room, which had a bar in it, and was open on Sunday; and on a Sunday the cash-box was stolen. The defendant's liability turns upon the question whether he has taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; if not, he is deemed to be guilty of 'gross negligence' and liable for the loss.<sup>2</sup> Again: The defendants receive a deposit of bonds from a stranger, S, to be kept without reward. Subsequently another stranger calls for and gets the bonds, representing himself to be S, the depositor. The judge instructs

<sup>1</sup> As indicating the tendency to discard the old theory of the three degrees of negligence, see *Wilson v. Brett*, 11 M. & W. 113; *Hinton v. Dibdin*, 2 Q. B. 646; *Grill v. General Collier Co.*, L. R. 1 C. P. 600; *Beall v. South Devon Ry. Co.*, 3 H. & C. 337; *Giblin v. McMullen*, L. R. 2 P. C. 317, 328; *The New World*, 16 How. 469; *Milwaukee Ry. Co. v. Arms*, 91 U. S. 489, 494; *Cass v. Boston & L. R. Co.*, 14 Allen, 448; *Lane v. Boston & A. R. Co.*, 112 Mass. 455; *Briggs v. Taylor*, 28 Vt. 180.

In the Roman law there were two branches (rather than degrees) of negligence, expressed respectively by the terms 'culpa levis' and 'culpa lata.' The former was the absence of the diligence of a good man of affairs ('diligentia boni patrisfamilias'); the latter the failure to exercise those mental faculties which all men habitually exercise ('non intellegere quod omnes intellegunt'). The two ideas together answer pretty nearly to our prudent, careful, diligent, or skilful man in the particular situation.

<sup>2</sup> *Doorman v. Jenkins*, 2 Ad. & E. 256. The question, it will be seen, was not whether the defendant had taken the same care of the money that he took of his own.



the jury that, if the defendants are guilty of want of 'ordinary care' under all the circumstances, they are liable, otherwise not. The instruction is correct, being equivalent to a ruling that the defendants are liable for gross negligence only.<sup>1</sup> Again: The defendants receive a deposit of debentures to be kept without reward, and the cashier of the bank fraudulently abstracts the same and makes away with them. The defendants are liable if they have failed to exercise 'ordinary care,' which means a failure to exercise that ordinary diligence which a reasonably prudent man takes of his own property of the like description.<sup>2</sup>

685. The foregoing are examples of liability in cases of bailment without reward; but the same principles govern bailments for hire. For example: The defendants, **Bailment for warehousemen for hire, lose by theft the plain-** hire. **tiff's property,** while the same is in their keeping. They have exercised the care usually exercised in the vicinity by other like warehousemen. They are not liable, having exercised 'ordinary care.'<sup>3</sup> Again: The defendants, warehousemen in a large city, receive from the plaintiffs for reward a large quantity of salt in barrels, which they store in a loose frame warehouse, situated in an alley, back of their business house. Of the whole amount about two hundred and forty barrels are stolen; and it is afterwards discovered that the theft was going on at intervals for a month. It was effected by entering through an opening in the side of the building, a plank there being off, and then opening the alley door and rolling out the barrels. Drays were thus loaded early in the morning, sometimes before sunrise, sometimes a little after; the defendants having no watchman there. The defendants are liable, because they failed to exercise 'ordi-

<sup>1</sup> *Lancaster Co. Bank v. Smith*, 62 Penn. St. 47. See also *Foster v. Essex Bank*, 17 Mass. 479, 486.

<sup>2</sup> *Giblin v. McMullen*, L. R. 2 P. C. 317; *Fulton v. Alexander*, 21 Texas, 148.

<sup>3</sup> *Cass v. Boston & L. R. Co.*, 14 Allen, 448. See *Lane v. Boston & A. R. Co.*, 112 Mass. 455.



nary care or diligence ;' though it appears to be usual in the particular city to pile such barrels in open sheds, or on vacant lots, or on the sidewalk, or occasionally in warehouses such as the one in question, — some supervision or examination of the premises being reasonably required in the course of a month.<sup>1</sup>

686. The result therefore is, that the terms 'gross negligence' and 'negligence' are, with regard to goods bailed, 'Gross negli- now used to prescribe liability where the defend-  
gence.' ant or his servants have not taken the same care of the property intrusted to them as a prudent man would have taken of his own in the same situation.<sup>2</sup> Or as it has recently been laid down by judicial authority: For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is 'gross negligence.' What is reasonable, varies in case of a gratuitous bailee and that of a bailee for hire. From the former are reasonably expected such care and diligence as persons ordinarily use (that is, careful persons) in their own affairs, and such skill as the bailee has. From the latter are reasonably expected such care and diligence as are exercised in the ordinary and proper course of similar business, and such skill as the bailee ought to have; namely, the skill usual and requisite in the business for which he receives payment.<sup>3</sup>

687. On the other hand, in regard to the converse question of the duty of the bailor to the bailee (which does not concern the dogma of the three degrees of negligence), it is clear that a gratuitous bailor stands in a different position from a bailor for reward. A bailor for a price may well be required to look to the safety of the bailee; but a man cannot be required to enlarge his *gift*, as he would be if he were to be held liable for defects in the chattel by which

<sup>1</sup> *Chenowith v. Dickinson*, 8 B. Mon. 156.

<sup>2</sup> *Briggs v. Taylor*, 28 Vt. 180. See also *Duff v. Budd*, 3 Brod. & B. 177; *Riley v. Horne*, 5 Bing. 217; *Batson v. Donovan*, 4 B. & Ald. 21.

<sup>3</sup> *Beal v. South Devon Ry. Co.*, 3 H. & C. 337, Exch. Ch., *Crompton, J.*, speaking for the court.

the bailee sustained damage, for to make him liable would virtually be to say that he must put the chattel in good condition before lending it. It would require some assurance in a gratuitous bailee to say to the bailor, 'I want your cart to fetch my turnips to market, but you must put it in perfect order if you let me take it.' For 'passive' negligence, i. e. a want of knowledge of defects which by care or diligence he might have known, the bailor would not be liable.<sup>1</sup>

688. The contrary would be true if the bailor's negligence was 'active,' that is, if he knew of the danger and did not notify the bailee.<sup>2</sup> It is then the duty of the bailor, whether the bailment be for reward or not, to notify the bailee of danger if he knows there is danger; as where a person employs another to carry an article which from its dangerous nature requires more than ordinary care; in such a case the bailor must give reasonable notice of the nature of the article, otherwise he will be liable for the natural consequences of the neglect.<sup>3</sup> For example: The defendant delivers a carboy of nitric acid to the plaintiff, servant of a Croydon carrier, to be taken to Croydon, without notifying him of the nature of the article; and there is nothing in its appearance to indicate its nature. While he is carrying it, the carboy bursts from some unexplained cause, and the plaintiff is injured. The defendant is liable.<sup>4</sup>

## § 5. OF BAILMENT FOR SERVICE.

689. Thus far of bailment for custody (*locatio custodiæ*), or for hire (*locatio rei*), or the like. The bailment may require the performance of services upon chattels (*locatio operis*); but the rule with regard to diligence is still the same. The bailee is bound to exercise ordinary care; to wit, the care of a prudent man of the same

<sup>1</sup> See *Indermauer v. Dames*, L. R. 1 C. P. 274 (s. c. L. R. 2 C. P. 318); Cases, 482, 489. The text applies equally to gifts. Id.

<sup>2</sup> Id.

<sup>3</sup> Willes, J., in *Farrant v. Barnes*, 11 C. B. N. s. 553, 564.

<sup>4</sup> *Farrant v. Barnes*, supra. See *Brass v. Maitland*, 6 El. & B. 470.

occupation, and under the same circumstances. He is also bound to exercise a fair average degree of skill in relation to the business which he undertakes; to do his work in a workmanlike manner; and to be possessed of sufficient skill to execute it. He will therefore be liable, *prima facie*, if he should either make an engagement without sufficient skill to execute it, or if, possessing the adequate skill, he should not exercise it. For example: The defendant hires a horse of the plaintiff which becomes slightly sick. The defendant, not being a farrier, thereupon prescribes improperly for the horse, and the medicine kills it. A farrier being near at hand at the time, this is a breach of duty to the plaintiff.<sup>1</sup> Again: The defendant, a builder of houses, undertakes for the plaintiff to rebuild a good and substantial front to his house, but he builds the same so out of perpendicular that it must be taken down. The defendant is liable in an action for negligence.<sup>2</sup>

690. The degree of skill and care required rises in proportion to the value, the delicacy, and the difficulty of the operation. A workman employed to repair the **Nature of the work.** works of a very delicate instrument would be expected to exert more care and skill than would be required about an ordinary undertaking.<sup>3</sup> The criterion of liability however still remains the same; if all things are done by the workman which a careful and skilful workman in the same situation and business would do, he will be exonerated from liability though he break the instrument.<sup>4</sup>

691. It should be observed however with regard to cases requiring the exercise of skill, that a bailee is not to be required to possess extraordinary skill, such as is possessed by but few persons only in the particular business, but only a fair average, or ordinary, degree of skill; unless indeed he engage to possess extraordinary ability. In the absence of agreement or false representation, reasonable skill

<sup>1</sup> Dean *v.* Keate, 3 Campb. 4.

<sup>2</sup> Farnsworth *v.* Garrard, 1 Campb. 38.

<sup>3</sup> Story, Bailments, § 432.

<sup>4</sup> *Id.*

constitutes the measure of the engagement of the workman in regard to the thing undertaken.<sup>1</sup>

692. On the other hand, a bailee employed to do work unfamiliar to him is not liable, it seems, for failing to possess the requisite skill for the work, if he has not held himself out as possessing such skill. It is the bailor's fault if he intrust a work requiring the exercise of skill to one whom he knows to be without it. For example: The defendant, a matter, is employed by the plaintiff, with notice, to embroider a fine carpet, and the defendant, from want of skill, spoils the materials put into his hands by the plaintiff for the purpose. This is no breach of duty, the defendant not having represented himself competent for such work.<sup>2</sup>

Employment  
of unskilled  
workman.

693. It is further to be observed that if the loss or bad execution be not properly attributable to the fault or unskillfulness of the workman, or of his servants, but arise from an inherent defect in the thing upon which the work is done, the bailor, having furnished the materials, cannot treat the bailee as guilty of negligence.<sup>3</sup> But if the materials were furnished by the bailee, and the result were a failure to perform the contract altogether, or a failure to perform it within the time agreed upon, the bailee would be liable; unless perhaps the materials required by the bailor were such as he (the bailee) was not familiar with, and he had exercised such skill as he possessed in the management of them.<sup>4</sup>

## § 6. OF PROFESSIONAL SERVICES.

694. The only difference between the case presented in the present section and that in the preceding is that there is now no bailment of goods to be wrought upon. The rules of law with regard to the duty of the person employed are not materially different from those

Reasonable  
care and dili-  
gence.

<sup>1</sup> Story, Bailments, § 433.

<sup>2</sup> Id. § 435.

<sup>3</sup> Id. § 428 a.

<sup>4</sup> In the latter case the bailor might himself be liable to the bailee, as in case of injury from dangerous materials ordered by the bailor.

above presented. To render a professional man liable for negligence, it is not enough that there has been a less degree of skill than some other professional men might have shown. Extraordinary skill is not required unless professed or contracted for; a fair average degree of skill is all that can be insisted on. Or, as it has been laid down, a person who enters a learned profession undertakes to bring to the exercise of his business nothing more than a reasonable degree of skill and care. He does not undertake, if an attorney, that he will gain a cause at all events, or, if a physician, that he will effect a cure.<sup>1</sup>

695. For special illustration of the application of this doctrine, the nature of the liability of lawyers and of doctors of medicine for negligence may be taken.

696. Every client has a right to expect the exercise, on the part of his attorney,<sup>2</sup> of care and diligence in the performance of the business intrusted to him, and of a fair average degree of professional skill and knowledge; and if an attorney has not as much of these qualities as he ought to possess, or if, having them, he neglects to use them, the law makes him liable, *prima facie*, for any loss which may have been sustained thereby by his client.<sup>3</sup>

697. Hence an attorney possessed of a reasonable amount of information and skill, according to the duties which he undertakes to perform, and exercising what he possesses with reasonable care and diligence in the affairs of his client, is not liable for errors in judgment, whether in matters of law or of discretion, unless he profess to have a high order of skill.

698. It is clear however that, when an injury has been sustained which could not have happened except from want of reasonable skill and diligence on the part of the attorney,

<sup>1</sup> *Lamphier v. Phipos*, 8 Car. & P. 475, Tindal, C. J.; *Hart v. Frame*, 6 Clark & F. 193, 210; *Graham v. Gautier*, 21 Texas, 111; *Dashiell v. Griffith*, 84 Md. 363.

<sup>2</sup> 'Attorney' here = lawyer of any grade or name.

<sup>3</sup> *Saunders, Negligence*, 155.

the law will hold him liable. To take proceedings upon a wrong statute, where there is no question of doubtful construction involved, would be evidence of negligence under this rule. For example: The defendant, an attorney, is employed to take statutory proceedings on behalf of the plaintiffs against their apprentices for misconduct. The defendant proceeds upon a section of the statute relating to servants and not to apprentices. This is deemed such a want of skill or diligence as to render the attorney liable to repay to the plaintiffs the damages and costs incurred by his mistake.<sup>1</sup>

699. If an attorney has doubt in regard to the legal effect of an instrument in which his client is concerned, and submits the question to counsel for advice on which to act, he must state the facts correctly and with fulness. If, instead of laying the facts of the case fully before counsel, he attempts to state inferences from the facts, he acts at his peril. The counsellor should be permitted to draw his own inferences. For example: The defendant, a lawyer employed by the plaintiff, seeking counsel of another lawyer, misstates the legal effect of certain deeds not accompanying the case, whereby he (the defendant) receives and acts upon incorrect advice, to the damage of the plaintiff. This is evidence of negligence.<sup>2</sup>

700. In the like exercise of due care and skill, an attorney employed to investigate the title to an estate, or to seek out a good investment and obtain security for money advanced, must examine the title to and extent of the security offered; and even then, if the title prove obviously defective, or the security prove evidently bad or insufficient, he will be liable.<sup>3</sup>

701. The authorities, finally, appear to establish the rule that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of court, for the want of care in the preparation of a cause for trial, or of attendance

<sup>1</sup> *Hart v. Frame*, 6 Clark & F. 193.

<sup>2</sup> *Ireson v. Pearman*, 3 B. & C. 799.

<sup>3</sup> *Knight v. Quarles*, 4 Moore, 532; *Whitehead v. Greetham*, 10 Moore, 183; *Donaldson v. Haldane*, 7 Clark & F. 762.



thereon with his witnesses, and for the mismanagement of so much of the conduct of the cause as is usually allotted to his department of the profession. On the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually submitted to one in the highest walks of the legal profession.<sup>1</sup>

**702.** To render a doctor of medicine liable for negligence, there must likewise appear to have been a failure to exercise **Doctors of** such diligence or skill as a prudent practitioner **medicine.** of fair ability would have exercised under the same circumstances.<sup>2</sup> The degree of diligence required will be proportionate to the nature of the case; and, in some cases, nothing short of the highest degree of diligence can satisfy the law.

**703.** As regards the *skill* to be exercised however, nothing more than a reasonable degree can be insisted upon; the law does not require the exercise of the highest medical ability,<sup>3</sup> unless the party has held himself out as possessed of it or has contracted to give it. For example: The defendant, a physician, is retained as accoucheur to attend the plaintiff's wife, and the plaintiff alleges that he failed to use due and proper care and skill in the treatment of the lady, whereby she was injured. The judge instructs the jury that it is not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question to be decided is, whether there has been a want of competent care and skill to such an extent as to lead to the bad result.<sup>4</sup> Again: The defendant, a surgeon, is employed by the plaintiff to treat an injury to his hand and wrist; and the plaintiff alleges that he conducted himself in the business in such a careless, negli-

<sup>1</sup> Godefroy v. Dalton, 6 Bing. 460.

<sup>2</sup> Dashiell v. Griffith, 84 Md. 363.

<sup>3</sup> Graham v. Gautier, 21 Texas, 111.

<sup>4</sup> Rich v. Pierpont, 3 Fost. & F. 35.

gent, and unskilful manner, that the plaintiff's hand became withered, and was likely to become useless. The judge instructs the jury that the question for them to decide is, whether they are satisfied that the injury sustained is attributable to the want of a reasonable and proper degree of care and skill in the defendant's treatment. The defendant's business did not require him to undertake to perform a cure, nor to use the highest possible degree of skill.<sup>1</sup>

**704.** If the patient, by refusing to adopt the remedies of the physician, frustrate the latter's endeavors, or if he aggravate the case by his own misconduct, he, of course, cannot hold the physician liable for the consequences attributable to such action. Still if, after such misconduct, the physician continue to treat the patient, he will be liable for any injury sustained by reason of his own negligence in such subsequent treatment.<sup>2</sup> Want of consideration is by the better rule no defence.<sup>3</sup>

### § 7. OF TELEGRAPH COMPANIES.

**705.** Telegraph companies are bound to exercise reasonable diligence and care in the transmission of messages, which in their business imports a very high degree of diligence and care,<sup>4</sup> and are liable to the senders for any failure to conform to the requirements of this duty.<sup>5</sup> They are not insurers of the correct transmission of despatches,<sup>6</sup> but they are presumptively liable for failure to transmit a message correctly.<sup>7</sup>

Great diligence and care.

<sup>1</sup> *Lamphier v. Phipos*, 8 Car. & P. 475. These two cases, though at nisi prius, are often referred to as authority. Like the second is *Wood v. Clapp*, 4 Sneed, 65.

<sup>2</sup> *Hibbard v. Thompson*, 109 Mass. 286; *Wharton*, Negligence, § 737.

<sup>3</sup> *Gill v. Middleton*, 105 Mass. 479. But see *Ritchey v. West*, 23 Ill. 385, proceeding upon the old notion of bailment without reward.

<sup>4</sup> *Jones v. Western Union Tel. Co.*, 101 Tenn. 442.

<sup>5</sup> *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428, 434.

<sup>6</sup> *Western Union Tel. Co. v. Chamblee*, supra; *Western Union Tel. Co. v. Carew*, 15 Mich. 525, 533; *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 706, 710.

<sup>7</sup> *Western Union Tel. Co. v. Chamblee*, supra; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256.

**706.** They are indeed presumptively bound to deliver the precise message given them for transmission, when it is legibly written.<sup>1</sup> For a failure to do so they are liable, in the absence, at least, of a rule requiring the message to be repeated by the receiver, and this too even in the face of a notice to the contrary; unless the error was caused by the condition of the atmosphere, or by some other obstacle, without fault on the part of the telegraph company. For example: The defendants receive a message from the plaintiffs for transmission at night, ordering a cargo of corn at a price named by the owner. The message is written upon a blank of the defendants, at the top of which is a declaration that the defendants are not to be liable for mistakes, or delays, or non-delivery beyond the sum paid for the message. The message is sent; but, by reason of the defendants' negligence, it is not correctly delivered, and the plaintiffs fail to obtain the corn at the price named, the grain having directly advanced in price. The defendants are liable, the notice being unreasonable.<sup>2</sup>

**707.** A condition that the telegraph company shall not be liable to the sender of a despatch for a mistake in it, unless the message shall be repeated by the receiver, is however held by many, but not by all, authorities to be reasonable and valid, though referred to as among the conditions on the back of the blank used by the sender, and though it be not read.<sup>3</sup> And the same is true of a condition that the telegraph company shall not be liable for mistakes occurring on other lines, in the course of transmitting a message, though the first company receive pay for the entire transmission.<sup>4</sup> But it is held that a condition that the company shall not be

<sup>1</sup> Cases just cited.

<sup>2</sup> See *True v. International Tel. Co.*, 60 Maine, 9. The message was not delivered at all in this case.

<sup>3</sup> *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Wolf v. Western Union Tel. Co.*, 62 Penn. St. 83; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western Union Tel. Co. v. Carew*, 15 Mich. 525. Contra, *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428; 25 Am. & Eng. Encycl. Law, 791, 792, and cases cited.

<sup>4</sup> *Western Union Tel. Co. v. Carew*, *supra*.

liable for mistakes or delays in transmitting despatches applies merely to the transmission, and not to delays in delivering them.<sup>1</sup>

**708.** It is proper, in this connection, to observe that, by the American law, the telegraph company is also liable to the person to whom the message is transmitted, upon delivery thereof, in case of an error in transmission attributable to the fault of the company, when the error is attended with damage to the person receiving it.<sup>2</sup> The rule is otherwise in England.<sup>3</sup> But the telegraph company is (probably) under no liability to the person to whom a message is addressed for a failure, however negligent, to deliver, unless the sender was his agent.

#### § 8. OF THE DUTY OF AGENTS, SERVANTS, TRUSTEES, AND THE LIKE.

**709.** The test of the liability of an agent to his principal for damage done by reason of alleged negligence is, speaking generally, the conduct of a diligent or careful or skilful agent in the like situation. If the agent's action conform to this standard, he will be exempt from liability; otherwise not. But it is important to look into this rule somewhat.

**710.** In accordance with the general rule, it is held not

<sup>1</sup> *Bryant v. American Tel. Co.*, 1 Daly, 575.

<sup>2</sup> *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; *Telegraph Co. v. Mellon*, 96 Tenn. 66, 69; *New York & W. Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Cases*, 450; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Gulf Ry. Co. v. Levy*, 59 Texas, 563. See *Lyne v. Western Union Tel. Co.*, 123 N. C. 129; *Manly Manuf. Co. v. Western Union Tel. Co.*, 105 Ga. 235; *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa, 160. The ground of liability is variously stated. See *L. C. Torts*, 621 et seq. One ground taken is that the defendants are to be treated as having made to the plaintiff a false representation of their authority from the sender to deliver the message. *May v. Western Union Tel. Co.*, 112 Mass. 90.

<sup>3</sup> *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 706. The English courts hold that the only duty owed by the telegraph company is to the sender of the message.

necessary, in order to fix the liability of a factor to his principal for damage, to prove that the factor has been guilty of fraud or of such gross negligence as might carry with it a presumption of fraud. The factor is required to act with reasonable care and prudence in his employment, exercising his judgment after proper inquiry and precautions.<sup>1</sup> If the exercise of ordinary diligence on his part would have prevented the loss, he will be liable; otherwise not. For example: The defendants, factors, are directed by the plaintiff, their principal, to remit in bills the amount of funds in their hands. They do so in the bills of persons who at the time are in good credit in the place in which the factors reside, though not in the place of residence of the plaintiff. If they have not notice of the latter fact, the defendants are not liable; due diligence not requiring them to make inquiry of the credit of the parties to the bills at the place of residence of the principal, when they are of good credit at the place of residence of the factors.<sup>2</sup> Again: The defendants, factors, are requested to remit to the plaintiff, their principal, in bills 'on some good house in New York,' the plaintiff's place of residence. They remit in the bills of R and B, partners, drawn upon and accepted by B, the former residing at the place of residence of the defendants, the latter at the place of residence of the plaintiff, to the defendant's knowledge. R and B have houses of business at both places. R (the resident party) is in good credit at the defendant's place of residence, but B (the New York party) is not. The defendants are liable whether they knew B's standing or not; being bound to make inquiry in regard to him.<sup>3</sup>

711. Extraordinary emergencies may arise in which an agent may, on grounds of necessity, be justified in assuming extraordinary powers; and his acts fairly done under such circumstances will be deemed lawful.<sup>4</sup>

**Emergency may add authority.** Indeed it seems clear that the presence of such emergencies may not only justify, but, in the light of pru-

<sup>1</sup> Story, Agency, § 186.

<sup>2</sup> *Leverick v. Meigs*, 1 Cowen, 645.

<sup>3</sup> *Id.*

<sup>4</sup> Story, Agency, § 141; Bailments, § 83.



dence, even demand the resort to extraordinary measures. Ordinarily, it is proper and (probably) necessary for an agent to deposit the funds of his principal in bank;<sup>1</sup> but if a hostile army were approaching the place at the time, to the knowledge of the agent, prudence would require him to make some other and unusual disposition of the funds.<sup>2</sup>

**712.** The duty of an agent employed to procure insurance is to take care that the policy is executed so as to cover the contemplated risk; and to this end he is, of course, bound to possess and use reasonable skill. Agents for insurance. The agent is also to take care that the underwriters are in good credit; though it is enough that they are at the time in good repute.<sup>3</sup>

**713.** What is the proper exercise of diligence and skill in such cases is sometimes a matter of great nicety. On the one hand, an agent who acts bona fide in effecting insurance for his principal, using reasonable skill and diligence, is not liable to be called to account, though the insurance might possibly have been procured from other underwriters on better terms, or so as to include additional risks, by which the principal might, in the event of loss by those risks, have been indemnified.<sup>4</sup> On the other hand, an agent in the like case is bound to have inserted in the policy all the ordinary risks commonly covered; and if he omit to have them inserted when a reasonable attention to his business and the objects of the insurance would have induced other agents, of reasonable skill and diligence, to have them inserted, he will be liable for negligence in case of loss.<sup>5</sup> And the same will be true if he negligently or wilfully conceal a material fact or make a material misrepresentation whereby the policy is afterwards avoided.<sup>6</sup>

<sup>1</sup> Heckert's Appeal, 69 Penn. St. 264.

<sup>2</sup> See Wood v. Cooper, 2 Heisk. 441.

<sup>3</sup> Story, Agency, § 187.

<sup>4</sup> Story, Agency, § 191; Moore v. Mourgue, Cowp. 479.

<sup>5</sup> Id. § 191; Park v. Hammond, 6 Taunt. 495.

<sup>6</sup> Mayhew v. Forrester, 5 Taunt. 615.



714. If however it should appear that, even if the duty expected had been performed with proper care, the principal could have derived no benefit therefrom, either because the result would have been contrary to express law or to public policy or to good morals, the negligence of the agent or other party acting in the matter is not a breach of duty.<sup>1</sup>

715. Servants also are bound to take due care of their master's interests, so far as intrusted to them. If a servant be guilty of a failure to exercise such care or skill **Due care, skill, and prudence.** or prudence as a diligent servant would exercise under the circumstances, and the master suffer damage thereby, the servant will be liable for a breach of duty. On the other hand, the servant is not bound to prevent loss to his master at all hazards; he is only required to use the care or skill of a diligent servant. For example: The defendant, a servant, loses by theft of another the goods of the plaintiff, his master and a carrier; but there is no proof of negligence on the part of the defendant. The plaintiff must bear the loss.<sup>2</sup> Again: The defendant, treasurer of the plaintiffs, is charged with a failure to pay over to the plaintiffs specific money in his possession. He pleads that after receiving the money, and before the time when he ought to have paid it or could have paid it to the plaintiffs, he was robbed by violence of the whole amount without any default or want of due care on his part. The plea shows that the defendant has not violated his duty to the plaintiffs.<sup>3</sup>

716. If too it should appear that the principal or master, upon a full knowledge of the circumstances, has deliberately ratified the acts or omissions complained of, though without consideration, he will then be compelled to overlook the breach of duty, and cannot recall his condonation of the offence.<sup>4</sup>

<sup>1</sup> Story, Agency, § 238.

<sup>2</sup> *Savage v. Walthew*, 11 Mod. 135, coram Lord Holt.

<sup>3</sup> *Walker v. Britith Guarantee Assoc.*, 18 Q. B. 277. See *Doorman v. Jenkins*, 2 Ad. & E. 256, ante, p. 334.

<sup>4</sup> Story, Agency, § 239.

717. A trustee is not liable at common law for a loss which has occurred through him, if he exercised ordinary skill, prudence, and caution.<sup>1</sup> In considering whether a trustee has made himself liable for a loss, such as one arising by reason of a failure to collect and convert into money the trust assets, regard must be had to the nature of the trust. A guardian is not in ordinary cases held to such prompt action in enforcing the collection of securities as an executor, administrator, or assignee acting for the benefit of creditors. The duty of a guardian is to hold and retain; of an executor, to collect and prepare for distribution.<sup>2</sup> But it is the duty of a trustee to be active in reducing to his possession any debt forming part of the trust fund; for the consequences of neglect he would be liable.<sup>3</sup>

Duty of trustees and guardians.

718. An administrator or executor, or an assignee of an insolvent, should within a reasonable time make proper efforts to convert all the assets and securities of the estate into money for distribution; failing to make such effort, the party is liable for any loss to the estate thereby sustained. For example: The defendant, an executor, fails for several years after the death of the testator to call in part of the personal estate left out on personal security by the testator himself. The debtor becomes bankrupt, but down to that time pays his interest regularly. Eight months afterwards, the plaintiffs, cestuis que trust, request the defendant to call in the money, but nothing can be found. The defendant is liable.<sup>4</sup>

Reasonable time.

719. If the business of the trustee be such as to involve questions of law, or such as to suggest the aid of legal coun-

<sup>1</sup> Twaddle's Appeal, 5 Barr, 15; *Miller v. Proctor*, 20 Ohio St. 442; *Harvard College v. Amory*, 9 Pick. 446, 461; *Hunt, Appellant*, 141 Mass. 515; *Charitable Corp. v. Sutton*, 2 Atk. 400, Lord Hardwicke.

<sup>2</sup> *Chambersburg Sav. Assoc. Appeal*, 76 Penn. St. 203; *Charlton's Appeal*, 34 Penn. St. 473.

<sup>3</sup> *Caffrey v. Darby*, 6 Ves. 488.

<sup>4</sup> *Powell v. Evans*, 5 Ves. 839; *Johnson's Estate*, 9 Watts & S. 107; *Chambersburg Sav. Assoc. Appeal*, *supra*.

sel, due care and diligence will (probably) require him to obtain legal advice. But having complied, and having no reason to suppose that the advice given is incompetent, the trustee will be exonerated in acting thereon. For example: The defendants, executors of an estate, under directions to invest the moneys of the estate on loan well secured, apply to a lawyer of good standing in another town concerning the security of a mill in that place, offered by a person desiring to borrow money of the defendants, and are told that the security is good; and a mortgage of the borrower's interest therein is accordingly taken. The mill however is owned by the borrower and another in partnership, and is liable for the firm debts. The owners become insolvent, and the note of a third person, well secured, is offered the defendants on condition of a release of the mortgage. By advice of the same lawyer, the offer is declined, and the mill security is lost. The defendants are not liable, having acted with the prudence of men of ordinary diligence, care, and prudence in the matter.<sup>1</sup>

**720.** Directors of corporations are bound to exercise all the ordinary diligence of persons in the same situation;<sup>2</sup> and that may vary according to the nature of the business.<sup>3</sup> In speculative ventures, so understood by all parties concerned, a less rigid rule of prudence would be applied than in transactions not speculative; and it is laid down that in cases of the first kind 'crassa negligentia' must be shown, if the directors acted within their powers, in order to impose liability upon them.<sup>4</sup> Directors are not in ordinary cases expected to devote their whole time and attention to the corporation over whose interests they have charge, and are not guilty of negligence in failing to give constant superintendence to the business. Other officers, to whom com-

<sup>1</sup> *Miller v. Proctor*, 20 Ohio St. 442; *Cases*, 455. The law in some of the States prescribes the duty of trustees in investing trust funds. *Ante*, p. 330, note.

<sup>2</sup> *Overend v. Gibb*, L. R. 5 H. L. 480, 494, Lord Hatherley.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

pensation is paid for their whole time in the affairs of the corporation, have the immediate management. But the duties may be such as to require all the time of the directors; and whatever the office, if they undertake it they must perform it fully.<sup>1</sup>

**721.** In relation to such other officers, the duties of directors are those of control; and the neglect which would render them liable for not exercising that control properly must depend upon circumstances. They are simply to exercise common diligence over those officers. If nothing, in the exercise of such diligence, has come to their knowledge to awaken suspicion concerning the conduct of the managing officers, the directors are not guilty of negligence, and hence are not liable for losses sustained by reason of the misconduct of such officers.<sup>2</sup> Those officers are the agents or servants of the corporation, not of the directors.

**722.** If however the directors become acquainted with any fact concerning the officers of the body, calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is, it seems, required; and a failure to exercise such care, resulting in damage to the corporation or to its customers, will render the directors personally liable.<sup>3</sup> And the same rule (probably) applies to all trustees or general officers having the oversight of subordinate officers. But generally speaking the liability of the directors or trustees in such cases is to the corporation itself and not to the individual members.<sup>4</sup>

<sup>1</sup> *York & North Midland Ry. Co. v. Hudson*, 16 Beav. 485, 491, Romilly, M. R.

<sup>2</sup> *Percy v. Millandon*, 20 Mart. 68.

<sup>3</sup> *Brewer v. Boston Theatre*, 104 Mass. 378. Quære, if 'crassa negligentia' would be necessary to create liability in such a case? But after all 'crassa negligentia' is only negligence in the particular situation; it is 'crassa' only as compared with what might be negligence in a different situation. See *Beal v. South Devon Ry. Co.*, 3 H. & C. 337, ante, p. 336. The want of that prudence which in the same circumstances a prudent man would exercise in his own behalf is 'crassa negligentia.' Lord Hatherley in *Overend v. Gibb*, L. R. 5 H. L. 480, 494.

<sup>4</sup> *Brewer v. Boston Theatre*, supra. It is only from necessity, and

### § 9. OF PUBLIC BODIES AND PUBLIC OFFICERS.

**723.** The fact that public bodies or public officers may have contracted with or assumed some duty to the State or to a municipal government to perform a duty faithfully does not imply that they may not also owe special duties to individuals in the performance of their business.<sup>1</sup> Their duties in this respect are like those of private individuals transacting similar business; and whether they receive emoluments or not is immaterial.<sup>2</sup> Such officers are bound to exercise the diligence which the nature of their position reasonably demands; and for a failure, resulting in special damage to any individual, they are liable to him.<sup>3</sup> For example: The defendant, a municipal corporation, accepts a grant from the English Crown conveying a borough, by which it is directed to keep in repair certain sea walls. The corporation fails in this duty, and the plaintiff, a private citizen, is injured thereby. This is a breach of duty to the plaintiff.<sup>4</sup> Again: The defendant, a public inspector of meat, undertakes, in accordance with his official duty, to cut, weigh, pack, salt, and cooper, for export, a quantity of beef belonging to the plaintiff, and does the same so negligently that the meat becomes spoiled and worthless. This is a breach of duty to the plaintiff, and the defendant is liable to him in damages.<sup>5</sup>

**724.** An individual cannot however for his own benefit, in his own name, maintain a suit against another for negligence in the discharge of a public duty where the damage is solely to the public.<sup>6</sup> The reason sometimes to prevent a failure of justice, that individual members of the corporation can proceed against the directors or trustees. *Id.*

<sup>1</sup> *Henley v. Lyme Regis*, 5 Bing. 91; s. c. 1 Bing. N. C. 222. See *Clothier v. Webster*, 12 C. B. N. s. 790; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93; *Rhobidas v. Concord*, 47 Atl. Rep. 82 (N. H.).

<sup>2</sup> *Mersey Docks v. Gibbs*, *supra*.

<sup>3</sup> See *Story*, Agency, §§ 320, 321; *Hayes v. Porter*, 22 Maine, 371.

<sup>4</sup> *Henley v. Lyme Regis*, *supra*. See *Rhobidas v. Concord*, *supra*.

<sup>5</sup> *Hayes v. Porter*, *supra*.

<sup>6</sup> *Black. Com.* i. 220.



times given for this is, that great inconvenience would follow if a person violating a trust of this kind could be sued by each person in the community.<sup>1</sup> A better reason, possibly, is, that as the right infringed belongs to the sovereign, as representing the public at large, so the correlative duty is one for the breach of which the sovereign alone can sue.

725. Officers and agents of the general government, such as postmasters and managers of public works, are not liable for the negligence or other misconduct of their subordinates, unless the latter are the servants of the former and accountable to them alone. Government officers are however liable for the consequences of their own negligence;<sup>2</sup> and this covers cases of negligence with respect to the conduct of such of their subordinates as are under their supervision and guidance.<sup>3</sup> For example: The defendant, a postmaster, appoints with notice an incompetent person as a clerk to the government in his post-office; and, by reason of the negligence or incompetence of such person, a letter containing \$100 belonging to the plaintiff is lost. The defendant is liable.<sup>4</sup>

Liability of  
public officers  
for acts of  
subordinates.

726. Officers of the courts are liable for the injurious consequences of such official acts of their own or of their servants as are attributable to want of the care of prudent men in the same situation.<sup>5</sup> For example: The defendant levies upon a quantity of coal on board a vessel. The coal is left on the vessel, with the master's consent, in charge of a keeper of the defendant, and while so held the

Officers of  
courts.

<sup>1</sup> Wharton, Negligence, § 286; *Ashby v. White*, *Ld. Raym.* 938.

<sup>2</sup> *Clothier v. Webster*, 12 C. B. n. s. 790; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93.

<sup>3</sup> *Story*, Bailment, § 463; *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632.

<sup>4</sup> See *Wiggins v. Hathaway*, *supra*.

<sup>5</sup> *Wolfe v. Door*, 24 Maine, 104; *Dunlop v. Knapp*, 14 Ohio St. 64; *Kennard v. Willmore*, 2 Heisk. 619; *Browning v. Hanford*, 5 Hill, 538; *Moore v. Westervelt*, 27 N. Y. 234.



vessel is sunk during a gale, with the coal on board, to the damage of the plaintiff, for whom the levy is made. The defendant is liable if he has failed to take such steps for the safety of the coal as a careful, prudent man, well acquainted with the condition of the vessel and its location with regard to exposure to storms, might reasonably be expected to take if the coal belonged to himself.<sup>1</sup>

**727.** A judge however, while acting in a judicial capacity, is not liable for negligence;<sup>2</sup> and the same is true even of a person acting in a situation which makes him no more than a private arbitrator.<sup>3</sup> Having submitted a dispute to the decision of an arbitrator, neither party can require him to exercise the skill or care of an expert, unless he has held himself out to possess it, or has agreed to exercise it. For example: The defendant, as broker, makes a contract for the plaintiff, as follows: 'Sold by order and for account of P, to my principal S, to arrive, 500 tons Black Smyrna raisins — 1869 growth — fair average quality in opinion of selling broker, to be delivered here in London — at 22s. per cwt.,' etc. This contract makes the defendant virtually an arbitrator, to determine between the parties any difference arising between them as to the quality of the raisins tendered in fulfilment of the contract, not stipulating for care or skill on the part of the defendant; and he is not liable for failing to exercise reasonable care and skill in coming to a decision, if he act in good faith, to the best of his judgment.<sup>4</sup>

#### § 10. OF THE USE OF PREMISES: DUTY TO PLAINTIFF.

**728.** In this section, the duty of the owner or occupant of premises to the *plaintiff*, for damages sustained thereon, by reason of the condition of the premises, is to be stated. The

<sup>1</sup> Moore v. Westervelt, 27 N. Y. 234.

<sup>2</sup> See Bradley v. Fisher, 13 Wall. 335, 350; Yates v. Lansing, 5 Johns. 282; Pratt v. Gardiner, 2 Cush. 63.

<sup>3</sup> Pappa v. Rose, L. R. 7 C. P. 32, 525; Tharsis Sulphur Co. v. Loftus, L. R. 8 C. P. 1. See Hoosac Tunnel Co. v. O'Brien, 137 Mass. 424.

<sup>4</sup> Pappa v. Rose, *supra*.

question of the existence and nature of the duty turns more or less upon the consideration of the occasion which brought the plaintiff there; that is, whether the plaintiff was a trespasser, a bare licensee, an invited licensee, a customer-licensee, or a licensee by law.<sup>1</sup> The question must therefore be considered with reference to each of these situations.

Division of  
the subject.

729. The owner or occupant of premises owes no duty of care or diligence to keep his premises in repair for the purposes of trespassers. In other words, it is no breach of duty to a trespasser that a man's premises were, by reason of his 'passive' negligence,<sup>2</sup> in a dangerous state of disorder, whatever the consequences to the former. But this rule of law must not be understood as declaring that the occupant or owner owes *no* duty to trespassers with regard to the management of his premises. He has no right even towards such persons to maim them, as by savage beasts, hidden guns, or missiles.<sup>3</sup> For example: The defendant has a savage dog on his premises, which he carelessly allows in the daytime to run at large unmuzzled, having notice that the dog is savage. The plaintiff, having strayed upon the premises without permission, while hunting, is attacked and bitten by the dog. The defendant is deemed liable.<sup>4</sup> Again: The defendant sets a spring-gun in his grounds to 'catch' persons entering thereon without permission, and fails to give notice of the particular danger. The plaintiff while trespassing on the premises is injured by the gun, having no notice of danger. The defendant is liable.<sup>5</sup>

Trespassers:  
due care:  
wantonness.

<sup>1</sup> For the case of servants, see § 11.

<sup>2</sup> Ante, p. 326.

<sup>3</sup> *Talmage v. Smith*, 59 N. W. Rep. 656 (Mich.).

<sup>4</sup> *Loomis v. Terry*, 17 Wend. 496, an extreme case.

<sup>5</sup> *Bird v. Holbrook*, 4 Bing. 628. As to notice now, see 24 & 25 Vict. c. 100, § 31. If, in the absence of statute, the trespasser had *knowledge* of the danger, or if a man entered in the night-time with a felonious intent, he (probably) 'assumed the risk' (see § 11) and could not recover; though even in such cases the owner of the premises would not be justified in purposely inflicting greater harm than would be necessary for the protection of his property and the expulsion of the intruder. See the two cases just cited; also *Hott v. Wilks*, 3 B. & Ald. 308; *Woolf v. Chalker*, 31 Conn. 121; ante, p. 245.

**730.** More than that, while the owner of premises is not bound to exercise care or diligence to keep his premises in repair for trespassers, he does owe the duty, even to such persons, not to suffer them to receive harm by reason of any improper condition of them if he knows that a trespasser is in danger thereby and can give him warning. For the owner, with knowledge that a person is in danger of harm from fault of his, the owner's, to do nothing, would show want of ordinary regard for, in other words, wanton or reckless disregard of, the person's safety, one of the forms of negligence already referred to.<sup>1</sup> In such a case, that person would have a legal right to proper warning, which, but for the owner's knowledge of his danger, he would not have apart from statute or from some menace to safety, of purpose, by the owner.<sup>2</sup> The sort of negligence for which the owner is not liable to trespassers, want of care or diligence in regard to the condition of his premises, is accordingly passive negligence; the sort for which he is liable, active negligence.<sup>3</sup>

**731.** A bare licensee, as the term is here used, is one who enters another's premises, or is upon some particular part of the same,<sup>4</sup> without request or inducement of the occupant, but still under circumstances from which he has come to suppose

Who are  
meant by  
bare licensees:  
duty to such.

<sup>1</sup> *Maynard v. Boston R. Co.*, 115 Mass. 458, Gray, C. J.; *Claridge v. So. Staffordshire Tramway Co.*, 1892, 1 Q. B. 422, fast driving. See ante, p. 325.

<sup>2</sup> See *Bird v. Holbrook*, supra, and the note following, and compare cases of gift, loan, or bailment of chattels which are defective or otherwise dangerous; the giver, lender, or bailor not being liable for damage unless he knew of the danger and did not give warning. *Coughlin v. Gillison*, 1899, 1 Q. B. 145, C. A.; *Indermanner v. Dames*, L. R. 1 C. P. 274 (s. c. L. R. 2 C. P. 318); *Cases*, 482, 489; *Farrant v. Barnes*, 11 C. B. n. s. 553, 564; ante, p. 337. If the act was a mere gratuity, the owner could not be required to enlarge his gift by making the chattel perfect; the most that could be demanded would be that he should give warning if he knew of the danger.

<sup>3</sup> Ante, p. 326, as to these terms, and see *Southcote v. Stanley*, 1 H. & N. 247, Bramwell, B., as to the second.

<sup>4</sup> See *Batchelor v. Fortescue*, 11 Q. B. D. 474.

a permission; as in the case of persons accustomed, without interference, to cross a portion of the line of a railway in no definite track,<sup>1</sup> or possibly of persons crossing an open field on a foot-path, commonly used by the neighbors, but without any right of way.<sup>2</sup> A person so doing, though not in a position to require the owner or occupant of the land to exercise care in regard to the management or the state of the premises,<sup>3</sup> occupies (probably) a more favorable position than a trespasser. He can, of course, insist that the occupant shall let loose no savage beast upon him, set no traps in his way without giving him fair notice,<sup>4</sup> or permit him to suffer harm there, knowing that he is in danger.<sup>5</sup> But further it should seem that, if it were usual for people to pass over the occupant's premises in the night-time, he could require the occupant to exercise reasonable care with regard to the keeping of vicious animals, of whose propensity to do harm the occupant has notice.

732. And it may be that some special duty has been assumed by the occupant, or has been imposed by law upon him, as in the case of a railway company to sound a whistle at certain places, or to keep gates shut while trains are passing; this too would modify the question of liability.<sup>6</sup> For example: The defendant, a railway company, has a rule that a whistle shall be sounded by express trains at a certain point where, with the acquiescence of the company, persons are accustomed to cross its track. The plaintiff's intestate attempts to cross at the point in the night, while a train is standing still in such a position, according to some of the evidence, as to prevent any one from seeing an approaching

<sup>1</sup> *Harrison v. Northeastern Ry. Co.*, 29 L. T. N. S. 844.

<sup>2</sup> *Morrow v. Sweeney*, 38 N. E. Rep. 187 (Ind.).

<sup>3</sup> *Batchelor v. Fortescue*, 11 Q. B. D. 474; *Harrison v. Northeastern Ry. Co.*, 29 L. T. N. S. 844; *Johansen v. Davies*, 57 L. J. Q. B. 392; *Sweeney v. Old Colony R. Co.*, 10 Allen, 368; *Cases*, 467.

<sup>4</sup> See *Hart v. Cole*, 156 Mass. 475, 477.

<sup>5</sup> *Southcote v. Stanley*, 1 H. & N. 247.

<sup>6</sup> *Dublin & Wicklow Ry. Co. v. Slattery*, 3 App. Cas. 1155; *Northeastern Ry. Co. v. Wanless*, L. R. 7 H. L. 12, as to open gates; *Williams v. Great Western Ry. Co.*, L. R. 9 Ex. 157, open gates.

express train, and is run over and killed. There is evidence, but it is contradicted, that a whistle was duly sounded, and there is evidence that the train carried lights. A jury may find the defendant guilty of breach of duty to the deceased.<sup>1</sup>

**733.** A bare licensee can insist upon the occupant's keeping his premises in a safe condition in another particular. A man has no right to render the highway dangerous or less useful to the public than it ordinarily is; if he *should* do so, he is liable as for a nuisance to any one who has suffered damage thereby.<sup>2</sup> And a bare licensee on the wrongdoer's premises will be entitled to recover for any damage sustained thereby. For example: The defendant digs a pit adjoining the highway, and fails to fence it off from the street. The plaintiff, while walking along the street, in the dark, accidentally steps a little aside in front of the pit, and falls into it, thereby sustaining bodily injury. The defendant's act in leaving the place unguarded makes it a public nuisance, and he is liable for the injury received by the plaintiff.<sup>3</sup>

**734.** If however the pit, though near, were not substantially adjoining the highway, so that the plaintiff must have been a trespasser before reaching it, he could not treat the omission of the defendant to fence as a breach of duty. For example: The defendants, being possessed of land near to an ancient common and public footway, construct a reservoir for receiving the back-wash of water at the lock of a canal owned by them. The plaintiff's intestate sets out by night along this footpath for Sheffield. The path runs alongside the canal for about three hundred yards to a point at which it is bounded on one side by a lock, and on the other by the reservoir. At this point the pathway turns to the right over a bridge, cross-

<sup>1</sup> Dublin & Wicklow Ry. Co. v. Slattery, *supra*. See also Davey v. Southwestern Ry. Co., 12 Q. B. Div. 70, affirming 11 Q. B. D. 213; Gray v. Northeastern Ry. Co., 48 L. T. N. S. 904.

<sup>2</sup> Ante, p. 299.

<sup>3</sup> Barnes v. Ward, 9 C. B. 392. But see *contra*, Howland v. Vincent, 10 Met. 371, in which however the point appears to have been overlooked that the defendant's act amounted to a public nuisance. And see Damon v. Boston, 149 Mass. 147.



ing the by-wash. A person continuing straight on in the direction of the pathway, and not turning to the right to go over the bridge, would find himself (if not prevented by the arm of a lock) upon a grassy plat about five yards long by seven broad, between the lock and the by-wash, level with, but somewhat distant from, the footpath; the plat being unfenced, and having a fall of about three yards to the water. On the morning following the setting out of the deceased, he is found drowned at this point. The defendants are not guilty of a breach of duty in not fencing the place, since it is not substantially adjoining the highway, and the deceased must have become a trespasser before reaching the reservoir.<sup>1</sup>

735. The same will be true of injury sustained by straying cattle or horses.<sup>2</sup> For example: The defendant digs a pit in his waste land within thirty-six feet of the highway, and the plaintiff's horse escapes into the waste and falls into the pit and is killed. The defendant has violated no duty to the plaintiff.<sup>3</sup> Again: The plaintiff's horse strays upon the defendant's railway track and is killed by negligence (short of wantonness, i. e. active negligence) of the defendant's servants. The defendant is not liable.<sup>4</sup>

736. If the licensee entered or acted by direct invitation or the occupant, the situation may become very different. In such cases the occupant owes a duty to the licensee, not merely to restrain his ferocious animals, and to prevent injury from dangerous concealed engines, and

Straying  
animals.

Invitation.

<sup>1</sup> *Hardeastle v. South Yorkshire Ry. Co.*, 4 H. & N. 67. See *Dinks v. South Yorkshire Ry. Co.*, 3 Best & S. 244; *Houndsell v. Smyth*, 7 C. B. N. s. 731; *Piggott*, Torts, 236.

<sup>2</sup> *Blyth v. Topham*, Croke, Jac. 158; *Maynard v. Boston & M. R. Co.*, 115 Mass. 458.

<sup>3</sup> *Blyth v. Topham*, *supra*.

<sup>4</sup> *Maynard v. Boston & M. R. Co.*, *supra*. See *Taft v. New York R. Co.*, 157 Mass. 297. See however *Charman v. Southeastern Ry. Co.*, 21 Q. B. Div. 524, under Statute. Wanton injury in such cases would create liability. *Maynard v. Boston & M. R. Co.*, *supra*; *Eames v. Salem R. Co.*, 98 Mass. 560; *ante*, p. 356.



to guard against nuisances adjoining the highway, but also, unless the invitation was for mere hospitality or benevolence or friendship, to keep his premises in reasonable repair, and to refrain from negligence generally; otherwise, he will be liable for any injury sustained by the licensee, not caused by the latter's own act. In other words, the owner or occupant is bound, except in cases of hospitality or the like, to exercise reasonable care to prevent damage from unusual danger, of which he has, or ought to have, knowledge.

**737.** This is true even in respect of gratuitous privileges touching public and quasi-public ways, such as railways and roadways for entering one's premises. For example: The defendants, a railroad corporation, have a private crossing on their land over their railroad, at grade, in a city, which crossing they have constructed for the accommodation of the public; and they keep a flagman stationed there to prevent persons from crossing when there is danger. The plaintiff coming down the way to the crossing with horse and wagon is signalled by the flagman to cross, and on proceeding, according to the signal, to cross the track, is run against by one of the defendants' engines; the flagman having been guilty of carelessness in giving the signal. This is a breach of duty, and the defendants are liable for the damage sustained.<sup>1</sup> Again: The defendant, owner of land, having a private road for the use of persons coming to his house, gives permission to a builder engaged in erecting a house on the land, to place materials on the road. The plaintiff, having occasion to use the road in the night, for the purpose of going to the defendant's residence, runs against the materials and sustains damage, without fault of his own. The defendant is liable; having held out an inducement to the plaintiff.<sup>2</sup>

**738.** The gist of the liability in such cases consists in the fact that the person injured did not act merely for his own

<sup>1</sup> *Sweeny v. Old Colony R. Co.*, 10 Allen, 368; Cases, 467. See *Holmes v. Drew*, 151 Mass. 578. As to the discontinuance of a gate-keeper see *Cliff v. Midland Ry. Co.*, L. R. 5 Q. B. 258.

<sup>2</sup> *Corby v. Hill*, 4 C. B. N. S. 556.

convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that the way was intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way was adapted and prepared or allowed to be so used.<sup>1</sup> The real distinction therefore is this: A mere passive acquiescence by an owner or occupier in a use of a way over his land by others, may involve no liability for negligence; but if, directly or by implication, he induce persons to enter upon his roadway for purposes not merely of hospitality or the like, he thereby assumes an obligation to keep it in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.<sup>2</sup>

**739.** It was urged in the authority in which this doctrine was laid down (a point worthy of notice here) that, if the defendants were liable in such a case, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at a place which they were not bound to keep open for use at all, and that the case would thus present the singular aspect of a party liable for neglect in the performance of a duty voluntarily assumed, and not imposed by law. The answer was, that this was no anomaly. If a person, it was observed, undertake to do an act, or to discharge a duty, by which the conduct of others may properly be regulated, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed shall not suffer loss or injury by reason of his negligence.<sup>3</sup> The liability in such cases does not depend upon the motives or considerations which induced a party to take on himself a particular duty, but on the question whether the

<sup>1</sup> *Sweeny v. Old Colony R. Co.*, supra, Bigelow, C. J.

<sup>2</sup> *Id.* See also *Bolch v. Smith*, 7 H. & N. 736, 741.

<sup>3</sup> See *Dublin & Wicklow Ry. Co. v. Slattery*, 3 App. Cas. 1155; *Cliff v. Midland Ry. Co.*, L. R. 5 Q. B. 258.

legal rights of others have been violated by the mode in which the charge assumed has been performed.<sup>1</sup> In other words, one may in certain cases be compelled to enlarge one's gift; the only help being not to make the gift.

**740.** It should be noticed however that this doctrine, as applied to gratuitous permission and invitation, is limited to special objects, such as private crossings over  
**Limitation of doctrine.** railways, and private roadways, which men have been led to suppose that they have a right to use. Having led the plaintiff so to act, the defendant cannot say that the plaintiff was only a licensee. The subject appears indeed to have started on the broader basis, that invitation, if actual, created of itself a duty to have the premises in fit condition for the purpose, so far as might be by due care or diligence;<sup>2</sup> but legal theory has changed, and the doctrine has been limited to cases like those just mentioned.<sup>3</sup> Very likely those cases are only examples of the limitation.

**741.** In relation to other cases it is now held that regard must be had to the nature of the invitation. If the licensee  
**Nature of the invitation a material consideration.** is invited only as a guest or friendly visitor or for benevolence, he enters on no better footing, so far as the present question is concerned, than if he were a bare licensee; he cannot hold the owner or occupant to any duty of care or diligence beyond giving notice of any danger of which he is aware.<sup>4</sup> Difficulty will sometimes arise in determining the nature of the invitation, — whether it is one purely of hospitality or benevolence, or not; for it will occasionally happen that other motives, perhaps stronger ones, will be united with the first, as for instance where the harm befell the plaintiff at a corner-stone

<sup>1</sup> *Sweeny v. Old Colony R. Co.*, supra, Bigelow, C. J.

<sup>2</sup> See *Sweeny v. Old Colony R. Co.*, supra, Bigelow, C. J.; *Gordon v. Cummings*, 152 Mass. 513, 515, Devens, J.

<sup>3</sup> *Plummer v. Dill*, 156 Mass. 426; *Hart v. Cole*, id. 475, 478. These cases accordingly distinguish *Sweeny v. Old Colony R. Co.*, supra, and like decisions.

<sup>4</sup> See the cases just cited.

laying, or at a college celebration, a religious conference,<sup>1</sup> or the like. But it seems that, where there is an element of benefit expected by the owner of the premises or other licensor, the invitation carries with it the duty not to be guilty of negligence in regard to danger known to him.

**742.** Where the harm arises by reason of a defective condition of the occupant's premises, it must be shown that the occupant had notice of the defect before the damage was sustained.<sup>2</sup> For example: The defendant is proprietor of a hotel, containing in one of the passages a glass door, the glass in which has gradually become loosened and insecure; but the defendant is not aware of the fact, nor is he in fault for not knowing it. The glass falls out as the plaintiff opens the door, and the plaintiff, a visitor merely, is injured. The defendant is not liable.<sup>3</sup>

**743.** The case of a person entering upon the premises of another as a customer, on purposes of business, is a stronger one against the occupant than that of a person invited to enter for hospitality, friendship, or benevolence. A greater degree of care ought to be taken to protect such a person than one to whom only an invitation was given. This is no gift, to be enlarged; it may even be the *duty* of the customer to enter, and not merely his convenience. A master may require his servant to go to a neighboring shop for provisions; an officer may be required to enter upon premises to make a levy. And the right to protection should and does cover both entering and leaving the premises.<sup>4</sup>

**744.** It is clear that the owner or occupant of the premises owes to customers the duty to keep the premises in such repair or condition as to enable them to go thereon for the

<sup>1</sup> See *Davis v. Central Congregational Soc.*, 129 Mass. 367, an extreme case of the kind.

<sup>2</sup> *Welfare v. London & B. Ry. Co.*, L. R. 4 Q. B. 693; *Southcote v. Stanley*, 1 H. & N. 247.

<sup>3</sup> *Southcote v. Stanley*, *supra*.

<sup>4</sup> *Chapman v. Rothwell*, El. B. & E. 168, *infra*.

transaction of their business in the usual manner of customers; and that, if injury happen by reason of the improper state of the premises, of which fact the occupant has notice, he will be liable. Or, as the rule has been stated from the bench, the owner or occupant of premises is liable in damages to those who come to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the premises or of the access thereto, which is known by him and not by them, and which he has negligently suffered to exist, and has given them no notice of.<sup>1</sup> For example: The defendant, proprietor of a brewery, leaves a trap-door in a passageway within his premises, leading to his office, open and unguarded by night, and the plaintiff's wife, in going through the passageway by night for purposes of business with the proprietor, falls, without fault of her own, down the hole and is killed. The defendant is liable.<sup>2</sup>

**745.** In accordance with the principle stated, the proprietors of a wharf, established for the use of the public, are liable for injury sustained by a vessel by reason of the dangerous condition of the place of landing, known to the proprietors of the wharf and carelessly allowed to remain, and not known to the plaintiff. For example: The defendants, owners of a wharf at tide-water, procure the plaintiff to bring his vessel to it to be there discharged of its cargo, and suffer the vessel to be placed there, at high tide, over a rock sunk and concealed in the adjoining dock. The defendants are aware of the position of the rock and of its danger to vessels; but no notice of its existence is given, and the plaintiff is ignorant of the fact. With the ebb of the tide, the vessel settles down upon the rock and sustains injury. The defendants are guilty of a breach of duty and are liable for the damage.<sup>3</sup>

<sup>1</sup> *Carleton v. Franconia Iron Co.*, 99 Mass. 216, Gray, J.

<sup>2</sup> *Chapman v. Rothwell*, El. B. & E. 168; *Freer v. Cameron*, 4 Rich. 228.

<sup>3</sup> *Carleton v. Franconia Iron Co.*, *supra*; *The Moorcock*, 13 P. D. 157; affirmed 14 P. Div. 64.



746. The question of the occupant's liability in cases like this, will be affected by the consideration whether the injured party was fairly authorized under the circumstances to go upon the particular part of the premises at which the accident happened. If the place was one which customers usually frequent without objection, it will be assumed that the party was authorized to go there. For example: The defendant, owner of a shop, situated upon a public street, let the upper stories thereof to another; and an entrance to the shop directly in front of the stairs which lead above is so constructed and kept constantly open that it is used for passage for persons going upstairs. There is a trap-door between the entrance and the stairs; and the plaintiff entering the place on business with the defendant, and in the exercise of due care, falls through the trap, the same being open, and is injured. The defendant is guilty of a breach of duty in leaving the trap-door open, and is liable to the plaintiff.<sup>1</sup>

747. If however a customer is injured by reason of the bad condition of a portion of the premises not open to the public, and no invitation or inducement has been held out to him by the owner or occupant to go there, he cannot recover for injury sustained there, though the place be frequented by the servants of the occupant. For example: The defendants are owners of a foundry, on the front door of the outer part of which is placed the sign 'No admittance.' The plaintiff enters the outer building to inquire after certain castings of his, and the defendant tells him that they are nearly ready, and sends a workman into the foundry part of the building to see about them. The plaintiff follows the workman, though not invited, and though none but persons employed there go into the foundry, falls into a scuttle, and is injured. The defendant is not liable.<sup>2</sup>

748. This duty to customers however requires the occupant to use due care over all parts of his premises and their appurtenances to which the customer has need of access in the performance of the business. For example: The defendants,

<sup>1</sup> *Elliot v. Pray*, 10 Allen, 378.

<sup>2</sup> *Zoebisch v. Tarbell*, 10 Allen, 385.



owners of a dock, provide a gangway for passage from the plaintiff's vessel; the gangway being in an insecure position, to the knowledge of the defendants, but not to the knowledge of the plaintiff. The plaintiff is injured while properly passing over the same. The defendants are liable.<sup>1</sup>

**749.** Workmen too on ships in dock, though not the servants of the dock owner, are deemed to be invited by him to use the dock and all appliances provided by him as incident to the use of the dock.<sup>2</sup> Indeed, the owner of premises may be liable, though the business was not transacted by the plaintiff in the usual way or place, provided he could not so do it conveniently, and was not prohibited from doing it as he did; the defendant or his servant seeing him at the time. The plaintiff is not deemed a bare licensee in such a case.<sup>3</sup>

**750.** Where the injury has been sustained, not by reason of any improper condition of the defendant's premises, but by a fall down an ordinary stairway, or the like, the defendant is not guilty of negligence in leaving a door open or in failing to give notice of the place where danger lies.<sup>4</sup>

<sup>1</sup> *Smith v. London Docks Co.*, L. R. 3 C. P. 326.

<sup>2</sup> *Heaven v. Pender*, 11 Q. B. Div. 503, 515. A broad rule of liability in negligence cases was laid down at p. 509 by Lord Esher, broader than the other judges were willing to accept. But it was considered correct in *Thrussell v. Handyside*, 20 Q. B. D. 359, 363. The rule of Lord Esher was thus stated: 'Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.' That would make an occupant of premises liable for passive negligence. For what *Heaven v. Pender* decides see *Cann v. Wilson*, 39 Ch. D. 39, 42. But *Cann v. Wilson* is overruled by *Le Lievre v. Gould*, 1893, 1 Q. B. 491.

<sup>3</sup> *Holmes v. Northeastern Ry. Co.*, L. R. 4 Ex. 254; s. c. L. R. 6 Ex. 123, Exch. Ch.

<sup>4</sup> *Wilkinson v. Fairrie*, 1 H. & C. 633; *Gaffney v. Brown*, 150 Mass. 479.

751. In regard to this class of cases, it is to be observed that, if there is no actual invitation to the injured person to go upon the premises in question, in order to recover damages for injury sustained he must have gone upon the premises for business with the occupier.<sup>1</sup> But this is not enough. A man has no right to intrude himself upon another, even for purposes of business. The business which will justify an entry upon the premises, and entitle the party to damages for injuries sustained, must, in the absence of an express invitation, or an engagement for services, be the business of the *occupant*, including business which he is bound to attend to.<sup>2</sup> A shopkeeper is bound to use due diligence to keep his premises in fit condition for persons who go to him to buy, but not for peddlers who go to sell;<sup>3</sup> unless indeed they are persons with whom he is accustomed to deal and whom he expects to come into his shop. So likewise, under the same circumstances, he would (probably) be liable for harm to a creditor, or his servant, who went into his shop to demand payment of a debt due,<sup>4</sup> but not to a beggar.

Business of  
occupier of  
land.

752. Customers, within the meaning of the foregoing paragraphs, appear to be persons with whom one is *accustomed* to have dealings, together with such as one has or seeks any particular dealing with. Besides these there are persons who may be called quasi-customers, who, entering for the benefit of the occupant, may be considered as presumptively invited by him, and accordingly stand on the same footing as customers. This class will include postmen,<sup>5</sup> policemen,<sup>6</sup> and perhaps firemen.<sup>7</sup> Officers,

Meaning of  
term 'cus-  
tomer.'

<sup>1</sup> *Collis v. Selden*, L. R. 3 C. P. 495; *Hart v. Cole*, 156 Mass. 475, 477; *Tebbutt v. Bristol & E. Ry. Co.*, L. R. 6 Q. B. 73, 75.

<sup>2</sup> *Hart v. Cole*, ut supra.

<sup>3</sup> *Id.*

<sup>4</sup> See *Indermaur v. Dames*, L. R. 1 C. P. 274; L. R. 2 C. P. 318; Cases, 482, 490, 491.

<sup>5</sup> *Gordon v. Cummings*, 152 Mass. 513, letter-box for tenants of defendant, on defendant's premises. See post, p. 387.

<sup>6</sup> *Learoyd v. Godfrey*, 138 Mass. 315; *Parker v. Barnard*, 135 Mass. 116.

<sup>7</sup> *Parker v. Barnard*, 135 Mass. at p. 119. But see cases in note 2, *infra*. There is difficulty sometimes in deciding whether a person is

certainly, entering by request of the occupant, on *business*, may recover for damage due to the occupant's passive negligence.<sup>1</sup> This should be equally true of persons entering under license of law, whether actually commanded to enter or not.<sup>2</sup>

## § 11. OF MASTER AND SERVANT: 'ASSUMING THE RISK.'

753. As a servant, when upon his master's premises, is there by express invitation of the master, the master should  
 What duty  
 master owes  
 to servant. and does owe a duty to him to exercise reasonable care, skill, and diligence in regard to the condition of the place, except in so far as the servant may have exempted his master from that duty. The exception is now the subject for consideration, and may be thus stated: The servant exempts his master from the duty in question<sup>3</sup> when he 'assumes the risk,' as the phrase is; which means, that, when the servant takes the risk freely and willingly, — as a willing man, 'volens,' — he cannot maintain an action against his master for what happens from the exposure. It is a case of consent; *volenti non fit injuria*.

754. The duty of the master towards his servant may now be more fully stated thus: Except in so far as the servant has assumed the risk, the master must exercise reasonable care, skill, and diligence, in the following things, — to have and keep his premises in safe condition for the servant, and,

to be considered as standing on the footing of a customer. What, for instance, is to be said of a person travelling, by a free pass, on a railroad? See *Quimby v. Boston R. Co.*, 150 Mass. 365, and the cases therein reviewed; *Rogers v. Kennebec Steamboat Co.*, 29 Atl. Rep. 1069 (Maine); *Griswold v. New York R. Co.*, 53 Conn. 371.

<sup>1</sup> Cases in note 6, *supra*.

<sup>2</sup> *Parker v. Barnard*, 135 Mass. at p. 119. But see *Gibson v. Leonard*, 32 N. E. Rep. (Ill.) 182; *Beehler v. Daniels*, 27 L. R. A. (R. I.) 512. There appears to be no such distinction in cases of license by law as prevails in license by the party, touching what may be called orders or ranks of license (bare licensees, invited licensees, etc.).

<sup>3</sup> A moral duty on the part of the master may no doubt remain, but it is of imperfect obligation. *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158, 159; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 136; *Yarmouth v. France*, 19 Q. B. D. 647, 657.

according to the employment, to provide and keep constantly for him safe ways, works, machinery, tackle, appliances, and the like, and competent men, and none but competent, to carry on the service with him.<sup>1</sup> And this duty cannot be delegated, so as to exempt the master; it is personal.<sup>2</sup> Accordingly, if the servant suffer damage by reason of failure in any of these things, the master will be liable. For example: The defendants employ the plaintiff to lay bricks for them, which must be carried up over a scaffold erected for the purpose by the defendants. The materials supporting the scaffold are in unfit condition, to the knowledge of both parties. The defendants personally, or by servants in charge, direct the plaintiff to go upon the scaffold, and the plaintiff does so, but not volens; the supports give way, and the plaintiff is thrown down and seriously hurt. The defendants are liable.<sup>3</sup> Again: The defendant, a maker of cartridges, sets the plaintiff, one of his servants, to work at a machine so constructed as to call for frequent replacing of one of its constituent parts; defect in such part being a defect in the machine. The defendant fails to have the part replaced on a particular occasion, when by reasonable care in inspection he might have known replacing was needed, and have made the change; and the plaintiff, exercising due care, sustains injury by the failure. The defendant is guilty of

<sup>1</sup> See *Texas R. Co. v. Archibauld*, 170 U. S. 665 (as to cars of other railroads); *Hanley v. California Bridge Co.*, 127 Calif. 232 (safe place for work); *Hennesey v. Bingham*, 125 Calif. 627 (safe place); *Channon v. Sanford Co.*, 70 Conn. 573 (safe place); *North Chicago R. Co. v. Dudgeon*, 184 Ill. 477 (safe place); *Crown v. Orr*, 140 N. Y. 450; *Bailey v. Rome R. Co.*, 139 N. Y. 302; *Toy v. United States Cartridge Co.*, 159 Mass. 313; *Illick v. Flint R. Co.*, 67 Mich. 632; *Fink v. Des Moines Ice Co.*, 84 Iowa, 321; *De Pauw Co. v. Stubblefield*, 132 Ind. 182; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Southwest Improvement Co. v. Andrew*, 86 Va. 270. See Cases, 479, 495, 500, 536. On the duty to give warning see *Fox v. Kinney*, 72 Conn. 401.

<sup>2</sup> *Leonard v. Kinnare*, 174 Ill. 532; *Railway v. Shields*, 47 Ohio St. 387; *Toy v. United States Cartridge Co.*, *supra*; *Fink v. Des Moines Ice Co.*, *supra*.

<sup>3</sup> *Roberts v. Smith*, 2 H. & N. 213; s. c. L. C. Torts, 684, Exch. Ch.

breach of duty to the plaintiff.<sup>1</sup> Again: The defendants are proprietors of a cotton mill, in which the plaintiff is employed by them. Part of one of the machines in the carding-room consists of a grooved pulley, over which a chain passes. To one end of the chain a weight is hung. An extra weight is hung by a raw-hide lacing to a hook fastened in the same chain. This latter weight did not come with the machine, and is not specially intended as a weight. It has been in use in aid of the machine however for two years, though not continually, and the machine works successfully, though not so well, without it. By reason of want of reasonable care on the part of the defendants, the lacing breaks, and the extra weight falls upon and injures the plaintiff while properly working at the machine. The defendants are guilty of breach of duty to the plaintiff.<sup>2</sup>

**755.** When does the servant assume the risk, so as to exempt the master from the duty in question? The answer **Assuming the risk.** must be distributed under two heads: first, in regard to risks assumed in the contract of service; second, in regard to risks otherwise assumed.

**756.** In virtue of the contract of service the servant presumptively assumes the ordinary risks of the service; by which is meant the risks incident to the business, or, in other words, the risks without which it would be impracticable to carry on the business;<sup>3</sup> *presumptively*, for it is possible that a servant might stipulate that he should not take certain of these risks. The risks which are incident to the business will cover the ordinary condition of the premises, while the work is going on, and being brought to a close, or being put

<sup>1</sup> See *Toy v. United States Cartridge Co.*, 159 Mass. 313, 315, language, in effect, of *Morton, J.* 'The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant,' — that is, so as to exempt the master. *Id.*; Cases, 479.

<sup>2</sup> *Rice v. King Philip Mills*, 144 Mass. 229.

<sup>3</sup> *Crown v. Orr*, 140 N. Y. 450; Cases, 495; *De Graffe v. New York Central R. Co.*, 76 N. Y. 125; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; Cases, 500.



in order. It is obvious that during such time the premises, especially those within which extensive industries are carried on, must be more or less in disorder; pieces of machinery, tools, tackle, and other things used in the business must be 'out of place' much of the time; elevators, shoots, and trap doors will, sometimes, in the pressure of business, be left open and unguarded; these and other exposures of a dangerous character, according to the business, must, speaking of servants, be allowed.<sup>1</sup> The greater part of such a state of things might not be negligence at all; some of it, such as the leaving open and unguarded, elevators, shoots, and trap doors, might be a breach of duty towards a customer,<sup>2</sup> while towards a servant of the proprietor it would not. The servant assumes the risk.<sup>3</sup>

757. It is plain inference that the risk thus assumed is the risk of negligence on the part of a fellow-servant, so far as that risk is 'ordinary;' for 'assuming the risk' does not mean assuming the risk of the master's negligence, except in cases to be mentioned, and the servant cannot complain if he has suffered by reason of his own negligence. But in point of law the servant is deemed to have assumed the extraordinary<sup>4</sup> as well as the ordinary risks of negligence on the part of his fellow-servants; no distinction *here* is drawn between the two kinds of risk. Indeed, at common law, all risks of negligence by a fellow-servant, not due to the master, are treated as 'ordinary.' It has accordingly been laid down as broad doctrine, at common law, that a servant cannot complain against his master of damage sustained by the negligence of a fellow-servant, where the master himself was not at fault.<sup>5</sup> For example:

<sup>1</sup> See *Murphy v. American Rubber Co.*, 159 Mass. 266, slippery floor.

<sup>2</sup> *Indermaur v. Dames*, L. R. 1 C. P. 274; s. c. L. R. 2 C. P. 318, Exch. Ch.; Cases, 482, a very important authority.

<sup>3</sup> *Id.* at pp. 679, 680, of L. C. Torts. See also *Thomas v. Quartermaine*, 18 Q. B. Div. 685.

<sup>4</sup> See L. C. Torts, 679, Willes, J.

<sup>5</sup> *De Freest v. Warner*, 98 N. Y. 211; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Farwell v. Boston R. Co.* 4 Met. 49; Cases, 508; *Pittsburgh R. Co. v. Devinney*, 17 Ohio St. 197; *Northern Pacific R. Co. v. Poirier*,

Ordinary and  
extraordinary  
risks.



A switch-tender of the defendants, a railroad company, who is deemed a fellow-servant of the plaintiff, negligently leaves open one of his switches, by reason of which an engine of the defendants runs off the track and injures the plaintiff, the evidence showing that the defendants themselves are not guilty of negligence in any way. The defendants are not liable.<sup>1</sup>

**758.** While, however, the master is (at common law) exempted from liability in such cases, — on the ground that, **Fellow-ser-** because the servant has assumed the risk, the **vants.** master is so far relieved of duty, — the courts have not agreed in the definition of the term ‘fellow-servant.’ By some of our courts, and by those of England, the term is declared to include all persons who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, even though in different grades or departments of it.<sup>2</sup> Others of our courts exclude the last clause (concerning different grades or departments of the work) from the definition; the plaintiff being held entitled to recover if the injury was caused by a servant working in a higher grade or in a different department of the service,<sup>3</sup>

167 U. S. 48 (brakeman and conductor of railroad train are fellow-servants); *Baltimore R. Co. v. Baugh*, 149 U. S. 368; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 692. This last case has been somewhat discussed on the point actually decided by it, but its general language is not disputed.

<sup>1</sup> *Farwell v. Boston R. Co.*, *supra*, leading case in this country.

<sup>2</sup> *Farwell v. Boston R. Co.*, *supra*; *De Freest v. Warner*, *supra*; *Lineoski v. Susquehanna Coal Co.*, 157 Penn. St. 153; *New England R. Co. v. Conroy*, 175 U. S. 323, and *Baltimore R. Co. v. Baugh*, 149 U. S. 368, overruling *Chicago Ry. Co. v. Ross*, 112 U. S. 377.

<sup>3</sup> *Pittsburgh R. Co. v. Devinney*, 17 Ohio St. 197, 210; *Chicago Ry. Co. v. Ross*, 112 U. S. 377, now overruled by *New England R. Co. v. Conroy*, *supra*. The doctrine of fellow-servants (exempting the master) does not apply to cases in which the master has committed to a servant any of those duties before mentioned which rest upon the master personally.

as for instance if the servant in a *higher* grade were a sort of vice-principal.<sup>1</sup>

759. This subject however is now very generally regulated by statute (Employers' Liability Acts), the general effect of which, speaking freely, is to overturn the rule that by the contract of service the servant presumptively assumes the risk of negligence on the part of his fellow-servants; though the rule still obtains that if the servant, in point of fact, voluntarily assumes a risk he exempts the master so far from his duty, and hence from liability for the consequences of the exposure. The maxim *volenti non fit injuria* still applies.<sup>2</sup> These statutes vary more or less in details, and cannot be considered further here.

Statute:  
maxim of  
consent not  
affected.

760. Thus far of the risks which the servant is presumed to have assumed. The presumption against him arises because the risks are ordinary and incident to the business. Extraordinary risks stand upon a different footing; no presumption arises from entering the service that the servant undertook these.<sup>3</sup> Still he may have done so. He may, in point of fact, have assumed the risk of a certain unfit condition of the premises, or of the works or appliances, — that is, of the master's negligence, or, even under the Employers' Liability Acts, of the negligence of a fellow-servant. It is accordingly laid down in effect that if the servant, *at the time of making the contract*, knew<sup>4</sup> of the existence of a particular extraordinary danger, and

<sup>1</sup> As to that aspect of the case see *New England R. Co. v. Conroy*, supra; *St. Louis Ry. Co. v. Touhey*, 67 Ark. 209; *Denver R. Co. v. Sipes*, 23 Col. 226; *Woodson v. Johnston*, 109 Ga. 454; *Sievers v. Peters Box Co.*, 151 Ind. 642.

<sup>2</sup> *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 136; *Cases*, 536.

<sup>3</sup> *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Cases*, 500.

<sup>4</sup> Some dicta put it thus: If the servant knew, or had the *means* of knowledge, etc. *Crown v. Orr*, 140 N. Y. 450; *Cases*, 495. But the latter clause should be omitted; it is inconsistent with requiring full appreciation of the danger.

fully appreciated<sup>1</sup> the same, his entering into the contract amounts to assuming the risk.<sup>2</sup> That is, just as, by entering the service, the servant assumes the ordinary risks, and exempts his master so far from duty, so now, by entering the service knowing and appreciating the nature of an extraordinary risk, he assumes that risk, and exempts his master from duty in regard to it.<sup>3</sup> For example: The defendants are a gaslight company, having a quantity of coal to be wheeled under sheds to a certain place, over high, narrow 'runs,' not provided with guards on the sides. The plaintiff enters into the defendants' service, to wheel coal over the runs, knowing that they are not provided with guards, and fully appreciating the danger, and in carefully wheeling over the same falls off the side, and is injured. The plaintiff assumed the risk, and cannot recover even under the Employers' Liability Act (in regard to defective ways, works, or machinery).<sup>4</sup> Again: The defendants are a railroad company, having had in their employ the plaintiff's intestate. The deceased was killed by being thrown from a

<sup>1</sup> *Ciriack v. Merchants' Woollen Co.*, 151 Mass. 152; *Nofsinger v. Goldman*, 122 Calif. 609. Nor does it apply where the harm was due to the combined negligence of the master and a fellow-servant. *Chicago R. Co. v. Gellison*, 173 Ill. 264. If for any reason the servant did not fully appreciate the danger, as for instance from mental deficiency or from inexperience, he has not consented. *Ciriack v. Merchants' Woollen Co.*, supra; *Consolidated Stone Co. v. Summit*, 152 Ind. 297. As to the master's duty to a servant under age, see *Alabama R. Co. v. Marcus*, 115 Ala. 389.

<sup>2</sup> Knowing the risk is not assuming it. *Dallemand v. Saalfeldt*, 175 Ill. 310; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 696, Bowen, L. J. See however *Staltder v. Huntington*, 153 Ind. 354, 368; *Wabash R. Co. v. Ray*, 152 Ind. 392, 400.

<sup>3</sup> *Crown v. Orr*, 140 N. Y. 450; *Kaare v. Troy Steel Co.*, 139 N. Y. 369; *White v. Witteman Lithographic Co.*, 131 N. Y. 631; *De Forest v. Jewett*, 88 N. Y. 264; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Ragon v. Toledo R. Co.*, 97 Mich. 265; s. c. 91 Mich. 379; *Illick v. Flint R. Co.*, 67 Mich. 632; *Batterson v. Chicago Ry. Co.*, 53 Mich. 125; *O'Neal v. Chicago Ry. Co.*, 132 Ind. 110; *Hayden v. Manuf. Co.*, 29 Conn. 548; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Kohn v. McNulta*, 147 U. S. 238.

<sup>4</sup> *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135; *Kaare v. Troy Steel Co.*, 139 N. Y. 369.

hand-car, which he and other servants of the defendants were propelling on the defendants' road. One handle of the walking-beam of the car was broken several weeks before, but the defendants' servants continue to use the car, using the handle of a pick or a crowbar in place of the broken part. A crowbar is being used on the day of the accident, when a train coming up behind on the same track, the servants, including the deceased, try to run the car to a distant switch, instead of removing it to another track. The men work the machinery with great force; five being engaged, two more than usual. This wrenches and breaks the lever or beam, and the plaintiff's intestate is thrown under the car and killed. The deceased had full knowledge and appreciation of the defect, and voluntarily continued in the service, without making objection. The defendants owed no duty in the matter to the plaintiff's intestate; he assumed the risk.<sup>1</sup> Again: The defendant is receiver of a railroad company, in which the plaintiff's intestate had been employed as switchman and car-coupler for nearly two years in the company's freight-yard. This yard is drained by many small open ditches, running across the tracks between the ties, all of which are in plain sight, were well known to the deceased, and existed when he entered the service. While coupling cars in the yard, the deceased steps into one of the ditches, falls, and is killed by the cars. The deceased assumed the risk.<sup>2</sup>

761. Further, the servant may have assumed the risk of extraordinary dangers arising after the contract was made, and not embraced in the contract of service at all; it is a question of fact whether he did. And the question, as in all other cases of extraordinary dangers, is whether he exposed himself freely,

Extraordi-  
nary risks  
arising after  
the contract.

<sup>1</sup> *Powers v. New York R. Co.*, 98 N. Y. 274. The servant should know the danger as well as the defects before he can be said to have assumed extraordinary risks. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Cases*, 500.

<sup>2</sup> *De Forest v. Jewett*, 88 N. Y. 264. See *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Kohn v. McNulta*, 147 U. S. 238.

knowing and fully appreciating the danger. If he did he cannot recover against his master. For example: The defendants, proprietors of a woollen mill, send the plaintiff to a dimly lighted part of a room therein, between running gear of the machinery so placed that it might easily catch the plaintiff's clothing and pull him into the wheels. The machinery in that part of the room is in plain sight. The plaintiff has not however been employed in that part of the room; he is not warned of the danger, though warning might have been given; but he goes to the place freely, his clothing is caught in the machinery, and he is hurt. The plaintiff, if he knew and fully appreciated the danger, assumed the risk, and the defendants are not liable.<sup>1</sup>

**762.** Where the extraordinary danger was contemporaneous with the contract of service, the plaintiff consents to the risk, as we have seen, if he then knew and fully appreciated the danger; his consent to the risk follows from his entering the service with knowledge and appreciation of the danger.<sup>2</sup> It is not however the servant's knowledge and appreciation of the danger that make his consent; it is the entering the service with such knowledge and appreciation. But where the extraordinary danger arises afterwards, the servant's knowledge and appreciation of it, and then entering the *danger*, do not necessarily constitute consent, even though he did not protest, object, or complain.<sup>3</sup> For example: The defendant, a boarding-house keeper, employs the plaintiff, in June, as a domestic servant. A flight of stairs leads from the kitchen of the defendant's house, on the outside of the same, to the back yard, down which the plaintiff has to go in the course of her service. The stairs are open and uncovered on the side towards the back yard, but covered overhead, except that a skylight there has, before the plaintiff's service began, lost

Extraordi-  
nary risks  
contempora-  
neous with  
contract.

<sup>1</sup> *Ciriack v. Merchants' Woollen Co.*, 151 Mass. 152.

<sup>2</sup> *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155; *Mahoney v. Dore*, id. 513; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135; *Cases*, 536.

<sup>3</sup> See however *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 112.



several panes of glass. It is now March, and rain, snow, and sleet have come in and fallen upon the stairs. The steps in consequence are icy. The weather is cold, and it is snowing. It is evening; the stairway is not lighted, though the plaintiff has been over it during the day, and knows its condition and fully appreciates the danger. She attempts to go down, in the discharge of her duties as servant, taking hold of the railing, trying to go safely, and exercising due care, but slips, falls, and is hurt. It cannot be held as matter of law that the plaintiff assumed the risk; whether she did assume it or not is a question of fact, and it may be found that she did not go freely, in which case the defendant owes a duty to the plaintiff which has been broken.<sup>1</sup>

**763.** It cannot have escaped notice that the expression 'assuming the risk' is used in the law in a technical and hence special sense. In popular speech it is common to say that one has 'taken the risk,' or, 'run the risk,' when the meaning merely is that one has incurred a great danger, as where one rushes before an approaching railway train to save a child on the track.<sup>2</sup> It is not ordinarily meant in such cases that the person exposing himself to danger has assumed the risk in the sense of exempting the one in control from the duty of care, as we have seen is the legal meaning of the expression.<sup>3</sup>

**764.** A final and important remark should be made. The doctrine under consideration is not a doctrine of contributory

<sup>1</sup> *Mahoney v. Dore*, 155 Mass. 513. See also the similar cases of *Fitzgerald v. Connecticut River Paper Co.*, id. 155, and *Osborne v. London Ry. Co.*, 21 Q. B. Div. 220.

<sup>2</sup> See *Eckert v. Long Island R. Co.*, 43 N. Y. 502. The rescue of a child in this case was treated on the footing of a question of negligence in the plaintiff's intestate, killed in the act, not as a question of assuming the risk. A majority of the court held that under the circumstance the deceased had not been guilty of negligence; the distinction being taken between attempts to save life and attempts to save property.

<sup>3</sup> The rule as to trespassers and bare licensees may, it seems, be put upon the ground of assuming the risk.



negligence. The servant, or indeed one not a servant, may assume the risk so as to bar any right of action by him, though he was not in the least negligent at the time.<sup>1</sup> Contributory negligence, which in fact often exists in these cases, makes an additional and distinct defence. The language of the authorities however sometimes fails to observe the distinction.<sup>2</sup>

Contributory  
negligence  
distinguished.

## § 12. OF INDEPENDENT CONTRACTORS: CONTROL: 'COLLATERAL' NEGLIGENCE.

765. A man may employ another to do work for him on a footing of independence on the part of the latter, concerning ways and means, subject only to the terms of the bargain made, and free accordingly from control by the employer. The person so employed is therefore neither the servant nor, legally speaking, the agent of the one who has employed him. This will be true of all cases of the kind, whatever the business, and however humble, at least in sound principle. Independence of the employer in ways and means is inconsistent with the relation of master and servant or principal and agent; for such relations in themselves, as we have elsewhere seen,<sup>3</sup> are relations of dependence, at least in the sense of a right in the employer to interfere and direct at all times.

Independent  
contractor dis-  
tinguished  
from servant  
or agent.

766. In former times this distinction was not always clearly grasped, with the result that the employer was sometimes held liable for the consequences of negligence by persons who are now commonly called independent contractors, as if they were servants or

The distinc-  
tion formerly  
overlooked.

<sup>1</sup> Mellor v. Merchants' Manuf. Co., 150 Mass. 362, 363.

<sup>2</sup> Note a want of clearness on this point in Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 158, 159.

It may be added that the principles relating to the subject of assuming the risk, as set forth above, are now recognized by most if not all of our courts, though in the application of them more or less conflicting dicta may be found, and some conflicting conclusions. The cases are innumerable.

<sup>3</sup> Ante, pp. 36-41.

agents.<sup>1</sup> But the better view finally prevailed, and such cases were put upon a footing of their own. The employer accordingly is held not liable for damage where the contractor, whether personally or by his servants, was guilty of negligence as a mere matter of detail in the course of the employment, as he would be if the contractor was a servant or an agent of his.<sup>2</sup> This is now the settled doctrine.<sup>3</sup> For example: The defendant employs a competent independent contractor to repair his chimneys; the latter having entire control over the details of the work, though the former retains the right of control over the premises. In the course of the work, by the negligence of the defendant's servants, bricks fall from the building upon which the work is going on, and hit and injure the plaintiff. The defendant is not liable.<sup>4</sup> Again: The defendant, a telephone company, employs an independent contractor to connect with lead and solder certain tubes through which the wires run. To do this it is necessary to create a flare from a benzoline blow-lamp, and the flare cannot be made without applying heat to the lamp. A servant of the defendant uses for the purpose a lamp which he should have known was defective. To heat the lamp quickly, he dips it into a pot of molten solder, whereupon, because of the defect in the lamp, an explosion takes place,

<sup>1</sup> *Bush v. Steinman*, 1 Bos. & P. 404; *Hilliard v. Richardson*, 3 Gray, 349; *L. C. Torts*, 636.

<sup>2</sup> *Hilliard v. Richardson*, *supra*; *Boomer v. Wilber*, 57 N. E. Rep. 1004 (Mass.).

<sup>3</sup> *Bonaparte v. Wiseman*, 89 Md. 12; *City R. Co. v. Moores*, 80 Md. 352; *Deford v. State*, 30 Md. 179; *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207; *Boomer v. Wilber*, *supra*; *Hilliard v. Richardson*, *supra*; *Connors v. Hennessey*, 112 Mass. 96; *Gorham v. Gross*, 125 Mass. 232, 240; *Sturges v. Theological Education Soc.*, 130 Mass. 414; *Harding v. Boston*, 163 Mass. 14; *Cuff v. Newark R. Co.*, 6 Vroom, 17; *Brown v. Accrington Cotton Co.*, 3 H. & C. 511; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 341, 352, C. A.; *Tenny v. Wimbledon District Council*, 1899, 2 Q. B. 72, C. A.; *Halliday v. National Telegraph Co.*, 1899, 1 Q. B. 221. See *ante*, pp. 41-43.

<sup>4</sup> *Boomer v. Wilber*, *supra*. The negligence was, said the court, in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held.

and the plaintiff, passing by, is hurt. The defendant is not liable.<sup>1</sup>

767. On the other hand the employer will be liable for the negligence of the independent contractor, or of his men, where the negligence is in the nature of a *vice in the work*.<sup>2</sup> For example: The defendant employs an independent contractor to construct a party-wall between his land and land of the plaintiff, half on the land of each. After the completion of the wall, it falls because of defects in its construction, and the plaintiff suffers damage thereby. The defendant is liable.<sup>3</sup>

768. This proceeds upon the ground that the duty undertaken by the contractor is really a duty resting upon the employer; and resting upon the employer, it cannot be delegated by him to another without the consent of the person or persons, usually the public, to whom he owes the duty. Thus the employer, if he will have a drain made, or a wall built, owes the duty to others to have a good and sufficient drain or wall constructed, — a drain that will carry off its contents properly, a wall that will stand so far as proper construction can make it stand. He owes this duty to all persons who may be affected by the construction of a bad drain or wall, in other words by a *vice in the work*; and he does not rid himself of the duty by employing an independent contractor to do the work, for that is no consent, by the persons harmed, to a bad job. And such *vice in the work*, it may be added, includes an *undertaking* which itself is a negligent

Ground of the doctrine:  
delegation of duty; control: vice in the work.

<sup>1</sup> Halliday v. National Telephone Co., *supra*. Wills, J.: 'If common care had been used, there was no danger to any one in the work ordered by the defendant to be done.'

<sup>2</sup> See cases in note 3, p. 379.

<sup>3</sup> Gorham v. Gross, 125 Mass. 232. Gray, C. J.: 'Where the very thing contracted to be done is imperfectly done . . . the employer is responsible for it.' The distinction is between 'negligence in a matter collateral to the contract and' cases 'in which the thing contracted to be done causes mischief.' Bonaparte v. Wiseman, 89 Md. 12, 21. See also, for the ground of the rule, Ohio R. Co. v. Morey, 47 Ohio St. 207, 214; City R. Co. v. Moores, 80 Md. 352.

thing, as in agreeing to build a wall without a proper foundation or other support.

769. It will be observed that the duty in question is a duty of one in *control*, not to be negligent therein, rather than the general duty not to be guilty of negligence. The employer, when liable for the independent contractor's negligence, is liable because he cannot divest himself of the duty to exercise control over having a job done that shall be safe to others. He has the right to see that the contractor does not undertake or turn out a dangerous piece of work; for that purpose he is in control, or rather has the *power* of control, over the work, notwithstanding the fact that he has committed the work to an independent contractor. The employer could, for instance, put a stop to the contractor's creating a nuisance of the work; the contractor is in control, at most, only so far as he keeps to a contract which is itself proper.

770. But in a case of negligence of the first kind spoken of, negligence, that is to say, by the independent contractor (or his men) merely, in the course of the employment, and not due to any vice in the work or undertaking, the employer is not in control; it is only a matter of ways and means, of which the contractor is dominus. Negligence of this kind is coming to be called 'collateral' negligence.<sup>1</sup>

771. It may of course be difficult sometimes to determine whether the employer has retained the power to control the person employed, in the absence of terms of control in the contract; and there may accordingly be doubt in regard to the soundness of some of the decisions, especially in regard to cases of humble employment.<sup>2</sup> But

<sup>1</sup> The term was first used by Lord Blackburn, in *Dalton v. Angus*, 6 App. Cas. 740, 829, and has been adopted in the recent English cases and in many of our own. See *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 342; *Bonaparte v. Wiseman*, 89 Md. 12, 21; *Ohio R. Co. v. Morey*, 47 Ohio St. 207; *Gorham v. Gross*, 125 Mass. 232, 240. The subject of the present chapter being negligence, we do not here consider cases of illegal works. See for such cases ante, p. 43.

<sup>2</sup> E. g. *Bracket v. Lubke*, 4 Allen, 138, where a carpenter employed

such decisions do not impeach the principle. There may be another difficulty in cases in which, while the contractor's calling is naturally an independent one, restrictions are placed upon it which give the employer, or another as his agent, for instance an architect, power at any time to stop, or change, or direct the work. Suppose that in such a case the employer does not avail himself of his rights, and that by reason of the 'collateral' negligence of the contractor the plaintiff suffers harm, will the employer be liable? The question has been answered in the negative.<sup>1</sup>

**772.** What has been said in the foregoing paragraphs applies equally to the question of the liability of the employer, or of the contractor, for the negligence of a sub-contractor.<sup>2</sup> The whole subject has been summed up in a passage elsewhere quoted: 'In ascertaining who is liable for the act of a wrongdoer you must look to the wrongdoer himself, or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable.'<sup>3</sup>

**773.** The doctrine of control leads to some kindred questions. Is the independent contractor himself liable for vice in the work after he has turned over the work to his employer?<sup>4</sup> Is a vendor of chattels liable to

to repair an awning is called and treated as a servant of the employer. But surely the carpenter's vocation is 'independent.' See *Connors v. Hennessey*, 112 Mass. 96. This case lays down a general test of independence; which perhaps should not be taken very strictly.

<sup>1</sup> *Frassi v. McDonald*, 122 Calif. 400. See *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, which perhaps is a case of the kind; but it was decided on the ground that there was a vice in the work. See also *Harding v. Boston*, 163 Mass. 14.

<sup>2</sup> *Cuff v. Newark R. Co.*, 6 Vroom, 17; *Rapson v. Cubitt*, 9 M. & W. 710; *Overton v. Freeman*, 11 C. B. 867; *Murray v. Currie*, L. R. 6 C. P. 24; *Bigelow's L. C. Torts*, 657.

<sup>3</sup> *Murray v. Currie*, L. R. 6 C. P. 24, 27, Willes, J.; ante, p. 42. First quoted as a general doctrine of tort, it is here quoted as a doctrine of negligence.

<sup>4</sup> Of course he remains liable for any collateral negligence of his, until the Statute of Limitations exempts him.



persons other than the buyer from him, for his own negligence? Is a landlord of leased premises liable to third persons who have suffered damage by reason of any negligent state of the same? These questions in order.

*owed to \$ 785.*

§ 13. OF COMPLETION OF WORK: SALE OF CHATTEL:  
LEASE OF PREMISES.

774. The independent contractor has completed the drain, the wall, the elevator, the gallery, the amphitheatre, the tenement house, and turned over the work to the employer, who accepts it; there is a vice in the work which now causes damage to another; is the contractor liable? If he has contracted for a right of inspection, he may well be; for the right to inspect (and amend, which follows) should give him sufficient power of control, unless perhaps the intervals of inspection are so far apart or are hampered by such restrictions as to make the right but nominal. But it should be observed that the contractor's liability rests at the same time upon the assumption that the damage happens to one entitled to exemption from harm by the vice in the work; which is only another way of saying that the contractor must have owed a duty to the particular person hurt.

Vice in the  
work turned  
over: inspection.

775. But suppose that the contractor has no right to inspect? It may be suggested that the contractor will still be liable for the sake of preventing circuity of action.<sup>1</sup> The owner is liable to the person hurt, and the contractor is (or may be) liable over to the owner; therefore the contractor is liable to the person hurt—that would be the case. But the soundness of the suggestion may be doubted. To make the contractor's liability turn upon his liability to the employer would be to make it subject to any discharge which the employer may have granted to him, as in the settlement of the business. The test should be whether the contractor owes a duty to the plaintiff; if he

Circuity of  
action.

<sup>1</sup> Compare *Lowell v. Spaulding*, 4 Cush. 277, landlord and tenant, and *qu.* as to the soundness of the suggestion. See *infra*.



does owe the duty, there is no place for the doctrine of circuity of action; if he does not owe the duty, no notion of preventing circuity should make him liable.

**776.** The case should then stand upon the principle of duty. Duty the contractor owed to the plaintiff while the work was in his hands; and that duty he could not *delegate*<sup>1</sup> to the owner by settlement of the business and turning over the work. So long as the duty exists, it cannot be delegated, so as to divest the person owing it of its binding force, without the consent of the person to whom it is owed. But a duty may be *extinguished* in certain ways without such person's consent. The dangerous thing may be repaired and made safe. Whether completing and turning over the work extinguishes the duty will perhaps turn upon the question whether the vice in the work was intended, or what in the way of negligence comes to the same thing, was due to reckless or wanton disregard of rights.<sup>2</sup> Perhaps the duty is extinguished where the negligence of the contractor was passive, that is, where he did not in fact know of the vice in the work, though he ought to have found it out.

**777.** The next question is of the liability of the vendor of a chattel to one who did not buy from him, for damage caused by his negligence in respect of the chattel. This question usually arises in relation to the effect of the chattel's passing through other hands before it reaches the plaintiff, and in that aspect is considered further on.<sup>3</sup> It will perhaps be enough at this place to say that for negligence in the sense of want of due care, that is want of knowledge when one should know, or passive negligence, and that *alone*, the vendor's liability does not extend to others than the buyer and those who, according to the clear purpose of the seller and the buyer,<sup>4</sup> are to use the chattel. The sale

Remote vendor of dangerous articles.

<sup>1</sup> There would be no need of delegation to account for the liability of the employer; the nature of his liability we have already seen.

<sup>2</sup> Compare *Maynard v. Boston R. Co.*, 115 Mass. 458, Gray, C. J.; *Southcote v. Stanley*, 1 H. & N. 247, Bramwell, B.

<sup>3</sup> *Infra*, § 16.

<sup>4</sup> *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338.

and delivery of the chattel puts the article out of the seller's control and also, in cases of mere passive negligence, destroys the duty; unless the very dangerous nature of the chattel imposes a special duty upon the vendor, — of which in another section.<sup>1</sup>

778. The last question is of the liability of a landlord of leased premises to third persons who have suffered damage by reason of the defective condition of the premises, due to negligence. But it must first be asked, whose negligence it was, the landlord's or the tenant's, unless it was the negligence of both. For if the landlord was not negligent, he cannot, it seems, be liable for the negligence of a tenant over whom he has no control.<sup>2</sup> There certainly may be negligences touching the premises for which the landlord, not being in control or having notice, cannot be responsible, as for leaving open a scuttle in the sidewalk for half an hour.

Lease of premises: duty of lessor.

779. On the other hand the landlord himself may have been guilty of negligence, and yet not be liable to a person who suffers damage thereby; for the landlord may owe no duty towards such person to keep the premises in proper condition. That would be the case where the person hurt had entered the premises on the invitation of, or on business with, the tenant alone. For example: The defendant lets an unfurnished house the staircase of which is then in a dangerous condition; the defendant being under no duty to put it in repair. The plaintiff comes upon the premises by request of the tenant, to move some furniture. While doing this he is hurt by reason of the defective state of the staircase. The defendant is not liable.<sup>3</sup>

<sup>1</sup> *Infra*, § 16.

<sup>2</sup> Query of tenancy at will? The landlord may put an end to the lease, but otherwise he has no control over the premises. While the tenancy continues the landlord has no more control or power of control than he would have if the tenancy were for a term of years. It should seem therefore that the text covers such cases.

<sup>3</sup> *Lane v. Cox*, 1897, 1 Q. B. 415.

**780.** It may be however that the damage was caused by a condition of the premises for which the landlord would be liable to the plaintiff regardless of the question whether the premises were let and out of his possession. Thus the damage may have been caused by the defective condition of the eaves of a house overhanging the street, whereby pipes fall from the same and strike one passing along in the highway. The landlord would be liable in such a case, if he had notice that the premises were in that state; for the owner of premises owes to the public, and to every member thereof, the duty to have his premises in safe condition for those who are passing in the highway, so far as by diligence he can. The highway must be safe and the landlord must not negligently make it unsafe, or after notice permit it to remain unsafe even in the hands of his tenant. He does not get rid of this duty by leasing his premises and thus putting them out of his hands. He would no doubt have sufficient power of control to enter and repair, unless the lease forbade; but even if the lease took away his right of repair, he would be liable, because he could not get rid of his duty to the plaintiff by contract with the tenant.<sup>1</sup> Sale alone would put an end to his duty.

**781.** It is not clear, where the premises fell into disorder by the negligence of the tenant alone, whether the landlord would be liable for damage done before having notice of the state of things. Probably he would not be, because the duty of control, which includes the duty of repair, appears to be a duty not to be guilty of negligence in the matter; the duty of control is not neglected if there be no reason to suppose that anything is wrong.

**782.** It will be seen from what has already been said that the common way of putting the rule of liability in cases of landlord and tenant, to wit, that the landlord is liable if the defective condition of the premises was due to his negligence,

<sup>1</sup> The duty to repair rests, in the absence of stipulation otherwise, on the tenant; and the tenant being accordingly bound to repair is liable for the neglect, whether the landlord is also liable or not. See *Lowell v. Spaulding*, 4 Cush. 277; *Fisher v. Thirkell*, 21 Mich. 1; L. C. Torts, 627.

though true in certain cases,<sup>1</sup> is too broad. Still, while it is true that the tenant is or may be<sup>2</sup> liable if he was negligent in the matter, the landlord also may be liable; enough that the landlord as well as the tenant owed a duty to the person suffering damage. And in cases in which the landlord has assumed, what apart from contract would rest upon the tenant, the duty of ordinary repair, the landlord will, it seems, be liable for the negligence of the tenant alone touching repairs (though not for the tenant's negligence in other respects);<sup>3</sup> but in principle not, even in such a case, to customers or guests of the tenant, for to them he owes no duty of the kind under consideration.

783. The question of liability will be complicated where there is a mixed tenancy between the landlord and tenant, or perhaps where the landlord has let a building in parts to several tenants with common entrances, hallways, and the like.<sup>4</sup> In the first of the two cases it seems that where the plaintiff was not hurt by reason of any duty which the landlord owed to the public (as where the premises were unsafe for persons passing in the highway), the general test of the landlord's liability is whether the plaintiff entered on business with him or by his invitation. If the plaintiff entered on business with, or by invitation of, the tenant, the tenant alone is liable, if either is.<sup>5</sup> As for the case of a building let in parts to several persons, with right of common entrances and hallways, it may be that the landlord should be held liable for the defective condition of such ways

<sup>1</sup> See *Fisher v. Thirkell*, 21 Mich. 1; s. c. L. C. Torts, 627; *Miller v. Hancock*, 1893, 2 Q. B. 177, C. A.; *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311; *Todd v. Flight*, 9 C. B. n. s. 377.

<sup>2</sup> The tenant would not be liable if he owed no duty to the plaintiff, as where the latter entered only as a customer or guest of the landlord.

<sup>3</sup> See *Fisher v. Thirkell*, supra; *Lowell v. Spaulding*, 4 Cush. 277.

<sup>4</sup> See *Lane v. Cox*, 1897, 1 Q. B. 415, C. A., supra; *Gordon v. Cummings*, 152 Mass. 513; *Marwedel v. Cook*, 154 Mass. 235. Or where a railway company has let its property and yet kept control of the running of the cars. *Chesapeake R. Co. v. Howard*, 178 U. S. 153, infra.

<sup>5</sup> See *Lane v. Cox*, supra; *Roche v. Sawyer*, 176 Mass. 71.

to customers of the tenants, where the duty of keeping the ways in order among several tenants is so cut up as to leave the duty a matter of doubt towards the plaintiff; for the sake of fixing liability somewhere, it may be that the landlord, though not in control or personally negligent, should be liable.<sup>1</sup> But that may be doubted. In principle the landlord should not be liable to his tenants' customers even for active negligence on his part, unless he remains in direct control, as in the case of a railroad company letting its property and yet running the trains.<sup>2</sup>

784. It has been suggested that the ground of the landlord's liability for his tenant's negligence, where he is liable for it, is that of preventing circuity of action. But that may be doubted,<sup>3</sup> as in the matter before considered,<sup>4</sup> except in regard to cases in which the landlord has assumed the duty of the tenant to make ordinary repairs. The true ground in general appears to be the duty of the landlord to the plaintiff; the question of liability accordingly being direct.

#### § 14. OF CONTRIBUTORY FAULT.

785. Generally speaking, it is a defence to an action of tort that negligence or other wrongdoing on the part of the plaintiff 'contributed' to produce the damage of which he complains.<sup>5</sup> The reason of this lies in the consideration that a man is not liable for damage which he has not caused;<sup>6</sup> or, conversely,

Meaning of  
the term:  
proximate  
and remote  
causes.

<sup>1</sup> See *Gordon v. Cummings*, 152 Mass. 515; *Marwedel v. Cook*, 154 Mass. 235, 236; *Plummer v. Dill*, 156 Mass. 426, 428.

<sup>2</sup> *Chesapeake R. Co. v. Howard*, 178 U. S. 153; *Texarkana R. Co. v. Anderson*, 67 Ark. 123. But qu. of *chattels* leased for use by the tenant's customers? Compare *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338; ante, p. 384; post, 398-400.

<sup>3</sup> *Lowell v. Spaulding*, 4 Cush. 277.

<sup>4</sup> Ante, p. 383.

<sup>5</sup> *Murphy v. Deane*, 101 Mass. 455. In some States the plaintiff in a suit for negligence has to prove that he was not guilty of contributory fault. Id.; *McLane v. Perkins*, 92 Maine, 39; *Getman v. Delaware R. Co.*, 162 N. Y. 21.

<sup>6</sup> The word 'cause' when here used alone = 'proximate cause.'



the law holds men liable for those wrongs alone which they have caused. If the defendant did not, either personally, or by another under his express or implied authority, cause the damage, he is not liable; and it is part of the plaintiff's case to show that the defendant wholly caused the damage of which he complains.<sup>1</sup> Now if there intervened between the act or omission of the defendant and the damage sustained an independent act or perhaps omission, whether of negligence or other wrongdoing, which, in the sense of a cause, contributed to effect the damage, it follows that the misfortune might not have happened but for that act or omission; and hence the plaintiff cannot prove that the defendant wholly caused the harm.

**786.** But an act or an omission may be said to 'contribute' to a result as well when it does not stand in the relation of a cause to that result as when it does; and the term 'contribute' or 'contributory' is in fact sometimes used of situations in which there is no connection of cause and effect recognized by law, that is, in cases in which the contributory act or omission is not 'causa proxima' as it must be to have any legal consequences, but is only 'causa remota.' 'Causa proxima, non remota, spectatur.' When the term in question is used in this broader sense, it will then be necessary to understand that only such contributory act or omission as may be considered a proximate cause<sup>2</sup> of the misfortune complained of can bar the action. But the stricter use of the term as causa proxima is the more common and better use. In some cases, the situation may be such that the plaintiff cannot recover even when the defendant's fault was adequate to produce the injury without the plaintiff's negligence, as in certain cases of collision where the fault on each side is contemporaneous.<sup>3</sup> But in no case can the plaintiff recover

<sup>1</sup> *Murphy v. Deane*, supra. The liability of a master for the (in fact) unauthorized torts of his servant, or of a principal for the like torts of his agent, stands on special grounds.

<sup>2</sup> Not necessarily as the only one.

<sup>3</sup> *Murphy v. Deane*, 101 Mass. 455, 464, 465; *Brember v. Jones*, 67 N. H. 374.



where the evidence falls *short* of showing that the defendant's act or omission proximately caused the injury.

**787.** On the other hand, conditions (remote causes) must not be confounded with proximate causes.<sup>1</sup> The mere fact that a person or his property is in an improper position, when, if he had not been there, no damage would have been done to him, does not preclude him from recovering.<sup>2</sup> Such circumstance is only a condition to the happening of the damage, not a cause of it.<sup>3</sup> The misfortune may have been a very unnatural and extraordinary result of the situation, not to be foreseen in the light of ordinary events; and, when that is the case, the fact that the person or property was in the particular situation is not in contemplation of law a cause of the damage. A man may in the daytime fall asleep in the country highway, or leave his goods there, and recover for injury by another's driving carelessly over him or them; since, though the position occupied is a condition to the damage, the damage is not the natural result of the act.<sup>4</sup>

**788.** The law therefore considers whether the conduct of the plaintiff had a natural tendency, such as exists between cause and effect, to place the party or his property in the direct way of the danger which resulted in the disaster. If it had not, it did not, in the sense of a cause, contribute to the injury. Such is the legal theory of contributory negligence or other fault as a bar to an action for tort. For example: The defendant sails a vessel in such a careless manner as to cause a collision with another vessel on which the plaintiff is a passenger; the plaintiff at the time standing in an improper place for passengers, to wit, near the anchor, which is struck by the defendant's boat and caused to fall upon the plaintiff's leg breaking

<sup>1</sup> Newcomb v. Boston Protective Dept., 146 Mass. 596; Cases, 557.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> See the remarks of Parke, B., in Davies v. Mann, 10 M. & W. 546, 549.

it. The defendant is liable; the plaintiff's standing in the improper position not contributing, in the stricter sense, to the injury, since it would not be the natural and probable result that one standing there would be hurt by a collision.<sup>1</sup> Again: The defendant driving carelessly along the highway runs against and injures the plaintiff's donkey, straying improperly therein, and fettered in his forefeet so as not to be able to move with freedom. This is a breach of duty to the plaintiff; the latter's act not contributing, in the same sense, to the damage.<sup>2</sup> Again: The plaintiff's vehicle, improperly placed in the highway, is run into negligently by the defendant's team. The plaintiff is not disentitled to recover because of the position of his vehicle.<sup>3</sup>

789. In accordance with the same principle, a traveller may be riding a horse or in a carriage which he had no right to take or use, or on a turnpike without payment of toll, or with a speed forbidden by law, or upon the wrong side of the road;<sup>4</sup> or his horses may be standing in the street of a town, without his attending by them and keeping them under his command as the law requires; in none of these cases is his right of action for any injury he may sustain by the negligent conduct of another affected by these circumstances. He is none the less entitled to recover, unless it appear that his own negligence or other wrongdoing contributed as a proximate cause to the damage.<sup>5</sup>

790. This is equally true though the plaintiff is a positive trespasser, as the examples elsewhere given of men injured by savage dogs or spring-guns while trespassing by day upon the defendant's premises clearly show;<sup>6</sup> for it is not the nat-

<sup>1</sup> *Greenland v. Chaplin*, 5 Ex. 243. Or, as Pollock, C. B., suggested, the plaintiff could not have foreseen the consequences of standing where he did; that is, such consequences were unusual, not the common effect of such an act.

<sup>2</sup> *Davies v. Mann*, 10 M. & W. 546.

<sup>3</sup> *Newcomb v. Boston Protective Dept.*, 146 Mass. 596.

<sup>4</sup> *Brember v. Jones*, 67 N. H. 374.

<sup>5</sup> *Norris v. Litchfield*, 35 N. H. 271, *Bell, J.*

<sup>6</sup> *Bird v. Holbrook*, 4 Bing. 628; *Loomis v. Terry*, 17 Wend. 496; ante, p. 355, note.

ural or usual effect of trespassing in the daytime (not feloniously) that the party should be bitten by a savage dog not known to be there, or maimed by the discharge of a hidden gun. Wrongful acts or omissions cannot be set off against each other, so as to make the one excuse the other, unless they stand respectively in the situation of true causes to the damage.

**791.** In this connection attention may be called to certain cases of injury sustained on Sunday through the defendant's negligence by a plaintiff engaged in acts neither **Violating Sunday laws.** of necessity nor of charity; in other words, in acts rendered unlawful by statute. By most of the courts it is held that the plaintiff is not thereby precluded from recovering for damage sustained, in the absence of explicit language to that effect in the statute; and this on the ground that the mere doing of the illegal act is not, or may not be, contributory in the proper sense to the damage sustained.<sup>1</sup> For example: The defendant, a town, bound to keep a certain bridge in repair, negligently allows it to get out of order; and the plaintiff, without notice of the condition of the bridge, in attempting to drive cattle over it to market on Sunday breaks through the bridge, several of his cattle being killed and others hurt thereby. The defendant is guilty of a breach of duty to the plaintiff, and liable to him for the damage sustained; the violation of the Sunday law not properly contributing to the result, since it is not the natural or usual result of travelling on Sunday that damage should follow.<sup>2</sup>

**792.** This is clearly correct in principle, in the absence of language of the statute plainly intended to prohibit all actions for damage sustained on Sunday, except such as is caused without any violation of law by the injured party; but the contrary rule prevails, or has prevailed, in some of the

<sup>1</sup> *Sutton v. Wauwatosa*, 29 Wis. 21; *Cases*, 546; *Mohney v. Cook*, 26 Penn. St. 342; *Corey v. Bath*, 35 N. H. 530; *Carrol v. Staten Island R. Co.*, 58 N. Y. 126.

<sup>2</sup> *Sutton v. Wauwatosa*, *supra*.

States.<sup>1</sup> This contrary rule however is considerably narrowed by the courts which adhere to it. It is considered not to apply to cases in which the defendant has misused property of the plaintiff hired on Sunday.<sup>2</sup> So too it is held that one who is walking on the highway on Sunday, simply for exercise or fresh air, may recover against a town for negligence whereby he has sustained damage.<sup>3</sup>

793. It will however be difficult sometimes to determine whether the fact or facts in question amount to a legal cause or only to a condition of the misfortune; and the courts may, for that very reason, be disposed to cut the matter short by laying down a positive rule of law covering the question.<sup>4</sup> Thus in the Federal courts, and in some States, contrary to the rule in others, the law requires one to 'look and listen' before crossing a steam or an electric railway or a highway; failure to do so is accordingly, by *prima facie* presumption, contributory negligence barring an action.<sup>5</sup> But such cases are not

Difficulties:  
special rules:  
'look and  
listen.'

<sup>1</sup> *Bosworth v. Swansea*, 10 Met. 363; *Jones v. Andover*, 10 Allen, 18; *Connolly v. Boston*, 117 Mass. 64. See however *Newcomb v. Boston Protective Dept.*, 146 Mass. 596, which in principle is opposed to these cases. The law of the State has been changed by statute recently.

<sup>2</sup> *Hall v. Corcoran*, 107 Mass. 251, overruling *Gregg v. Wyman*, 4 Cush. 322, on authority of which *Wheldon v. Chappel*, 8 R. I. 230, was decided. See also *Woodman v. Hubbard*, 25 N. H. 67; *Morton v. Gloster*, 46 Maine, 520.

<sup>3</sup> *Hamilton v. Boston*, 14 Allen, 475. See further *Cox v. Cook*, *id.* 165; *Feital v. Middlesex R. Co.*, 109 Mass. 398.

<sup>4</sup> See ante, pp. 329, 330, and notes.

<sup>5</sup> *Railroad Co. v. Houston*, 95 U. S. 697; *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379; *Baker v. Kansas City R. Co.*, 147 Mo. 140; *Connolly v. New York R. Co.*, 158 Mass. 8; *Cole v. New York R. Co.*, 174 Mass. 537; *Robbins v. Springfield Street Ry. Co.*, 165 Mass. 30 (drawing a distinction between steam and electric or horse railways); *Creamer v. West End Street Ry.*, 156 Mass. 320 (the same distinction); *Cawley v. La Crosse Ry. Co.*, 101 Wis. 145 (applying the rule to electric railways), and cases cited; maintaining the 'look and listen' rule. Contra, *Judson v. Central Vermont R. Co.*, 158 N. Y. 597; *Lawler v. Hartford Street Ry. Co.*, 72 Conn. 74; *Atlantic City R. Co. v. Goodin*, 45 L. R. A. 671 (N. J.) and cases cited. Compare *Herbert v. Southern Pacific R. Co.*, 121 Calif. 227; *Niosi v. Empire Laundry*, 117 Calif. 257 (crossing highway);

to be taken as invalidating the general theory of contributory negligence.

**794.** It is laid down in certain cases that, if the plaintiff could have avoided the disaster by the exercise of 'due care,' he is not entitled to complain of the negligence of the defendant.<sup>1</sup> This is not intended however to suggest a general test of liability. In the case of the fettered donkey above stated, the plaintiff might have avoided the effect of the defendant's negligence by keeping his animal at home, but he was still held entitled to recover. The meaning of the rule in question is that in the moment of actual peril the plaintiff must not be guilty of failing to exercise such reasonable care under the circumstances as he can, to protect himself against damage. Being at hand at the moment, the plaintiff might be able to prevent harm, and must govern himself accordingly.

**795.** One who however in a sudden emergency loses presence of mind through the misconduct of the defendant, and while in such loss, and owing to it, falls into danger and is hurt, is not thereby guilty of want of due care or of contributory negligence. The defendant's unlawful act has caused the loss of presence of mind, and what happens afterwards is but the natural effect of the act.<sup>2</sup>

*Chicago Ry. Co. v. Lowell*, 151 U. S. 209. And see *Chicago R. Co. v. Pearson*, 184 Ill. 386; *Harvard Law Rev.*, Nov. 1899, p. 226; ante, p. 329, note. The cases affirming the rule require one to look and listen, or to show a sufficient reason for not doing so in case of omission. *Baker v. Kansas City R. Co.*, supra. The cases contra leave it to the jury to determine, on the facts, without any presumption, whether the plaintiff was guilty of contributory negligence or not.

<sup>1</sup> *Haley v. Case*, 142 Mass. 316, 321; *Ferren v. Old Colony R. Co.*, 143 Mass. 197; *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152; s. c. 146 Mass. 182; *Russell v. Tillotson*, 140 Mass. 201; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junc. Ry. Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 516; *Tuff v. Warman*, 5 C. B. n. s. 573, Exch. Ch.; *Caswell v. Worth*, 5 El. & B. 849.

<sup>2</sup> *Coulter v. American Express Co.*, 56 N. Y. 585; *Getman v. Delaware R. Co.*, 162 N. Y. 21. See also *Johnson v. West Chester Ry. Co.*, 70 Penn. St. 357; *Galena R. Co. v. Yarwood*, 17 Ill. 509. Compare *The Bywell Castle*, 4 P. Div. 219. But see *Meyer v. Boepple Co.*, 83 N. W. Rep. 809 (Iowa).



For example: The defendant is carelessly driving an express wagon along the sidewalk of the street of a city, at a rapid rate, which suddenly comes up behind the plaintiff, when she instinctively springs aside to escape danger, and in so doing strikes her head against the wall of a building, and is hurt. The defendant is liable.<sup>1</sup> Again: The defendant, a railway company, negligently leaves the gates of a level-crossing open, and the plaintiff is thereby misled into crossing, supposing it to be safe to cross, but not using his faculties as well as he might have done under other circumstances; and he is hurt by a passing train. The defendant is liable.<sup>2</sup>

796. On the other hand, it is laid down in certain cases that the plaintiff may be entitled to recover, if the *defendant* might, by the exercise of 'due care' on his part, have avoided the consequences of the negligence of the plaintiff.<sup>3</sup> This too cannot be intended to suggest a general test of liability. In the case of one who in the want of due care has fallen through a trap-door left open by the defendant negligently, the defendant clearly might have avoided the consequence of the plaintiff's negligence by having closed the door; and yet he is not liable. The meaning of the rule is that where the plaintiff was not at hand, so as to prevent the damage, the defendant will be liable if by due care he might have prevented the harm and did not exercise it. The question would be proper in a case like that of the fettered donkey.<sup>4</sup> Again: The defendant is pilot of a steamer

<sup>1</sup> Coulter v. American Express Co., *supra*.

<sup>2</sup> Northeastern Ry. Co. v. Wanless, L. R. 7 H. L. 12; Sweeny v. Old Colony R. Co., 10 Allen, 368. See Davey v. Southwestern Ry. Co., 12 Q. B. Div. 70; Dublin & Wicklow Ry. Co. v. Slattery, 3 App. Cas. 1155.

<sup>3</sup> Tuff v. Warman, 5 C. B. N. S. 573, Exch. Ch., leading case.

<sup>4</sup> See also Radley v. London, & Northwestern Ry. Co., 1 App. Cas. 754, reversing L. R. 10 Ex. 100, and restoring L. R. 9 Ex. 71, a very instructive case. See especially p. 760, Lord Penzance, quoted in Pollock, Torts, p. 378. It is there stated that if the defendant 'might at this stage of the matter [the actual emergency] by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.'



on the Thames, which runs down the plaintiff's barge. There is no look-out on the barge, but there is evidence that the steamer might easily have cleared her. It is proper to leave it to the jury to say whether the want of a look-out is negligence in the plaintiff, and if so, whether it directly contributed to the damage done; the negligence of the plaintiff, if found, not barring his action if the defendant might have avoided the consequences of it by the exercise of due care.<sup>1</sup> If the rule referred to were applied to cases of simultaneous negligence, at the moment of disaster either party to a collision caused by their joint carelessness might be entitled to recover against the other; while, in truth, neither can recover.<sup>2</sup>

### § 15. OF COMPARATIVE NEGLIGENCE.

797. In some States a doctrine of 'comparative negligence' takes the place of the doctrine of contributory negligence.

**Doctrine stated.** It has been stated from the bench as follows: Where there has been negligence in both plaintiff and defendant, still the plaintiff may recover if his negligence was slight, and that of the defendant gross in comparison. And this rule has been extended to cases in which the negligence of the plaintiff has contributed, in some degree, to the injury complained of.<sup>3</sup> The defendant's negligence however must stand as a cause towards the injury.<sup>4</sup> Accordingly it was laid down, of death caused at a railroad crossing, that if the deceased was guilty of negligence in not observing the precautions which an ordinarily prudent man would observe before attempting to cross the track, then the real question was, whether his negligence in that respect was slight in comparison with that of the defendants, if they were guilty of negligence at all.<sup>5</sup>

<sup>1</sup> *Tuff v. Warman*, 5 C. B. N. S. 573.

<sup>2</sup> *Murphy v. Deane*, 101 Mass. 455, 464, 465. Some of the language in *Tuff v. Warman*, supra, is here criticised, but not so as to affect the example of the text.

<sup>3</sup> *Chicago & Q. R. Co. v. Van Patten*, 64 Ill. 510, 517, Scott, J.

<sup>4</sup> *Id.* at p. 514.

<sup>5</sup> *Id.* p. 517

## § 16. OF INTERVENING FORCES.

**798.** Thus far of the contributory acts or omissions of the plaintiff. But it may be that between the wrongful act of the defendant and the damage sustained by the plaintiff there intervened an act or agency of a **Unforeseen forces.** third person, in no way probable and not in fact anticipated,<sup>1</sup> which directly produced the damage. If this be the case, and the misfortune would not have followed without it, the defendant, similarly it seems, will not be liable. For example: The defendant wrongfully sells gunpowder to the plaintiff, a boy eight years old, who takes it home and puts it into a cupboard, where it lies for more than a week, with the knowledge of the child's parents. The boy's mother now gives some of the powder to him, which he fires off with her knowledge. This is done a second time, when the child is injured by the explosion. The defendant is not liable.<sup>2</sup>

**799.** Indeed the defendant can never be liable when anything out of the natural and usual course of events unexpectedly arises and operates in such a way as to make the defendant's negligence, otherwise harmless, productive of injury. A whirlwind does not usually arise on a quiet day, and hence, though a person should build a small fire in a country road, contrary to law, on a mild day, he would not (probably) be liable for the consequences of a whirlwind suddenly springing up and scattering the fire, to the damage of another.<sup>3</sup>

**800.** The case will be different if the party acted with knowledge or notice of the intervening act, agency, or force

<sup>1</sup> See *Clark v. Chambers*, 3 Q. B. Div. 327, as to damage resulting from removal by a third person of obstructions unlawfully put in the highway by the defendant, he being held liable.

<sup>2</sup> *Carter v. Towne*, 103 Mass. 507.

<sup>3</sup> Compare *Insurance Co. v. Tweed*, 7 Wall. 44. For all that happens in the regular course of things, under the conditions as they exist at the time of the act or omission in question, the defendant will be liable, though the particular harm resulting may have been altogether improbable. See the important case of *Smith v. Southwestern Ry. Co.*, L. R. 5 C. P. 93, and 6 C. P. 14, Exch. Ch.; ante, pp. 45, 46.

of nature. In this case he will be liable. For example:

**Notice.** The defendant shoots a pistol against a polished surface in a thoroughfare, at such an angle as to render it likely that the ball will glance and hit some one. It does glance and hits the plaintiff. The defendant has caused the injury and is liable.<sup>1</sup> Again: The defendant throws a lighted squib into a market-house on a fair-day, which strikes the booth of A, who instinctively throws it out, when it strikes the booth of B. The latter casts it out in the same manner, and it now strikes the plaintiff in the face, injuring him. The defendant is liable.<sup>2</sup> Again: The defendant wrongfully sells a mischievous hair-wash to the plaintiff's husband, knowing that it is intended for the plaintiff's use, and the plaintiff is injured in using it. The defendant is liable.<sup>3</sup> Again: The defendant, a manufacturer of drugs, negligently labels a jar, put up by him, of belladonna as dandelion, the former a poisonous, the latter a harmless, drug. The jar passes from the defendant to a wholesale dealer, then to a retail dealer, and a portion of it then to the plaintiff, who buys and takes it as dandelion. The defendant is liable; the intermediate parties have only carried out, in the sale, the intention of the defendant.<sup>4</sup>

**801.** In cases however where the alleged breach of duty is directly involved in a breach of contract, the courts qualifiedly deny the liability of the defendant to any one except to the party with whom he made the

**Breach of contract.**

<sup>1</sup> This example is fairly borne out by *Scott v. Shepherd*, 3 Wils. 403. Contrast *Stanley v. Powell*, 1891, 1 Q. B. 86.

<sup>2</sup> *Scott v. Shepherd*, 3 Wils. 403.

<sup>3</sup> *George v. Skivington*, L. R. 5 Ex. 1. See *Cann v. Willson*, 39 Ch. D. 39, 43; *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338.

<sup>4</sup> *Thomas v. Winchester*, 6 N. Y. 397; *Cases on Torts*, 567. The reason given by the court however was that the defendant, being engaged in a very dangerous business, acted at his own peril. Compare *Farrant v. Barnes*, 11 C. B. n. s. 553, and *Brass v. Maitland*, 6 El. & B. 470. See also *Schubert v. Clark*, 5 N. W. Rep. 1103; *Davidson v. Nichols*, 11 Allen, 514. The subject is well discussed in 2 *Law Quarterly Review*, 63-65; *Pollock, Torts*, 439 et seq., 2d ed.

contract,—a point elsewhere noticed.<sup>1</sup> The authorities are not altogether consistent, but there appears to be an agreement in regard to cases of intended harm; and the general result may be stated to be, that if the defendant intended or if he can fairly be assumed to have intended the acts of the intermediate agency, he will be liable, though his act was a breach of contract with another.<sup>2</sup> The fact of the existence of a duty to the person with whom he contracted is not inconsistent with the existence of another duty respecting the same thing. The duty to forbear to do intentionally a thing obviously harmful preceded the formation of the contract; and it is difficult to see how that duty, owed to all persons, could, by a contract made with one or several, be abrogated as regards others.<sup>3</sup>

**802.** The difficulty is with cases short of intention, that is, with cases of negligence only. It has been supposed that if, by the negligence of A, a contract is broken between B and C, the injured party cannot maintain any action against A; it being declared that no duty is infringed or exists except that created by the contract. For example: The defendant, a railway company, contracts with the plaintiff's servant to carry him safely to a certain place, but negligently injures him on the way. This is no breach of duty to the plaintiff.<sup>4</sup>

**803.** There is grave doubt however both in principle and upon authority, whether, apart from particular cases like

<sup>1</sup> Ante, pp. 196, 197. See L. C. Torts, 617–619.

<sup>2</sup> See *Langridge v. Levy*, 2 Mees. & W. 519; s. c. 4 Mees. & W. 338; also *Collis v. Selden*, infra, and *George v. Skivington*, above cited. Further see *Heaven v. Pender*, 11 Q. B. Div. 503, 514.

<sup>3</sup> See *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387, 390; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 340.

<sup>4</sup> *Fairmount Ry. Co. v. Stutler*, 54 Penn. St. 375; *Alton v. Midland Ry. Co.*, 19 C. B. n. s. 213. But see 1 Wms. Saund. 474; *Pollock, Torts*, 474, 2d ed. It has been pointed out that in *Winterbottom v. Wright*, 10 M. & W. 109, and *Longmeid v. Holliday*, 6 Ex. 761, generally relied upon for the rule under consideration, there was no negligence on the part of the defendant; in the one case knowledge of the defect not being alleged, in the other not being proved. *Pollock, Torts*, 477, 2d ed. See also *Collis v. Selden*, L. R. 3 C. P. 495.

the one just referred to, the rule itself upon which the decision is founded can be supported.<sup>1</sup> A railroad company or other person would not (probably) be liable to a master for an injury wrongfully done to a servant, without notice of the relation of master and servant.<sup>2</sup> But if there is a duty to refrain from intentional wrong, it is not easy to see why there cannot be a duty to refrain from negligence, where that is attended with notice of the contract, that is, of the rights of the plaintiff. The essential elements of legal duty are present in such a case; the rights of the plaintiff being known, danger is observed; hence the duty not to be guilty of misconduct touching such rights.<sup>3</sup>

804. As a question of authority, there are cases of negligence entitled to great weight which are quite inconsistent with the view that the contract creates the only duty that exists in such situations. For example: The defendant, a railway company, contracts with the plaintiff's master, with whom the plaintiff is to travel in the defendant's coaches, to carry the plaintiff's luggage to a certain place, which the defendant, through negligence, fails to do. This is a breach of duty to the plaintiff.<sup>4</sup> Again: The defendant, a railway company, receives the plaintiff into one of its coaches, on a ticket bought from another railway company, with which the defendant shares the profits of traffic. The steps of the defendant's coaches are too high for persons to alight easily at the station, which is owned by the other company; and in alighting with due care the plaintiff is hurt. The defend-

<sup>1</sup> See *Taylor v. Manchester Ry. Co.*, 1895, 1 Q. B. 134, 140; *id.* 944; *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387.

<sup>2</sup> Compare such cases as *Blake v. Lanyon*, 6 T. R. 221.

<sup>3</sup> *Ante*, p. 12.

<sup>4</sup> *Marshall v. York & Newcastle Ry. Co.*, 11 C. B. 655; *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442. The first of these cases was before *Alton v. Midland Ry. Co.*, *supra*, but the second was afterwards, and in it *Marshall's Case* was cited with approval by Blackburn, J. See also *Foulkes v. Metropolitan Ry. Co.*, 5 C. P. Div. 157; *Ames v. Union R. Co.*, 117 Mass. 541; and cases like *Henley v. Lyme Regis*, 5 Bing. 91, and 1 Bing. N. C. 222, *ante*, p. 352.



ant is liable, without regard to the question whether the plaintiff had contracted with the other company.<sup>1</sup>

805. If the duty resting upon the defendant be that of common carrier of passengers, or of goods, the carrier or bailee will be liable for the damage produced by a breach of his contract, due to his own negligence, even though the negligence of a third person should contribute to the damage sustained; for the party was bound to exercise due care, and has not done so.<sup>2</sup> For example: The defendants, a railroad company, contract to carry the plaintiff to W, but on the way the train carrying the plaintiff is brought into collision with the train of another railroad company, at a crossing, through the negligence of the managers of both roads, and the plaintiff suffers injury thereby. The defendants have violated their duty to the plaintiff, and are liable for the damage sustained by him.<sup>3</sup>

806. The same doctrine would indeed apply to cases arising under any ordinary absolute contract for the performance of a specific duty. For example: The defendants contract to supply the plaintiffs with proper gas-pipe. Gas escapes in a certain room from a defect in the pipe provided, a third person negligently enters the room with a lighted candle, and an explosion takes place. The defendants are liable for the loss thereby caused.<sup>4</sup>

807. The rule formerly prevailed in England that a passenger in a stage or railway coach, or other vehicle, became by the act of obtaining passage 'identified' in law with the driver or manager of the vehicle. **Doctrine of identification.** The effect of this doctrine was, that in an action by the passenger against a third person for negligence, whereby the former suffered damage in the course of the ride or journey, negligence on the part of the driver or manager of the

<sup>1</sup> Foulkes v. Metropolitan Ry. Co., supra.

<sup>2</sup> Compare Burrows v. March Gas Co., L. R. 7 Ex. 96, Exch. Ch.

<sup>3</sup> Eaton v. Boston & L. R. Co., 11 Allen, 500.

<sup>4</sup> Burrows v. March Gas Co., L. R. 7 Ex. 96, Exch. Ch.



vehicle in which the plaintiff has taken passage, contributing to the misfortune, was the negligence of the plaintiff. The plaintiff therefore was not entitled to recover, though he might himself have been free from fault.<sup>1</sup> This doctrine obtains in some of our courts.<sup>2</sup> For example: The defendant, owner of a stage-coach, by her driver's negligence runs over and kills the plaintiff's intestate, while he is alighting from another stage-coach; which latter coach, by the negligence of the driver, has stopped at an improper place for alighting. The latter's negligence is properly contributory, but the deceased was not personally at fault. The defendant is deemed not liable.<sup>3</sup>

808. The doctrine has been much criticised and often denied by other courts;<sup>4</sup> and in the form above presented it was recently overruled in England.<sup>5</sup> It was hard to understand how the plaintiff could be considered identified with the driver of the carriage when the driver was wholly under the control of another. The driver could not be the passenger's servant in any accurate sense in such a case; the essential feature of the relation of master and servant was wanting, to wit, authority over the supposed servant.<sup>6</sup> And, for the same reason, the driver could not be considered as the passenger's agent. The passenger could not contract directly with the driver in the first instance, or require him to go or to stay; nor could he compel him to stop by the way, or direct him to

<sup>1</sup> *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire Ry. Co.*, L. R. 10 Ex. 47; *Cleveland R. Co. v. Terry*, 8 Ohio St. 570; *Puterbaugh v. Reasor*, 9 Ohio St. 484; *Lockhart v. Lichtenthaler*, 46 Penn. St. 151; *Smith v. Smith*, 2 Pick. 621.

<sup>2</sup> See cases in note 1, *supra*.

<sup>3</sup> *Thorogood v. Bryan*, *supra*.

<sup>4</sup> *The Milan*, Lush. 388; *Brown v. McGregor*, Hay (Scotl.), 10; *Little v. Hackett*, 116 U. S. 366; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Coleman v. New York & N. H. R. Co.*, 20 N. Y. 492; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Danville Turnp. Co. v. Stewart*, 2 Met. (Ky.) 119.

<sup>5</sup> *Donovan v. Laing Syndicate*, 1893, 1 Q. B. 629, 634, Bowen, L. J.; *The Bernina*, 12 P. Div. 58, affirmed, nom. *Mills v. Armstrong*, 13 App. Cas. 1; Cases, 575.

<sup>6</sup> *Donovan v. Laing Syndicate*, 1893, 1 Q. B. 629, 634.

take a particular road, or how to drive, or how to pass a coach or an obstruction.<sup>1</sup> Instead of an identification between passenger and driver, the driver himself would be liable, with the other wrongdoer, to the passenger.<sup>2</sup>

809. If however the passenger were himself in fault, as by participating in the negligent conduct of the driver, or by directing it in advance, it is clear that he could not recover; supposing the negligence to have contributed to the misfortune. In such a case as this, he makes the driver, *pro hac vice*, his servant, and may therefore be said to be 'identified' with him.

810. Upon views not unlike those in regard to the supposed 'identification' of passenger and carrier, the negligence of the parent or guardian or other person in charge of a young child, in allowing the child to fall into danger, has sometimes been deemed 'imputable' to the child, so as to affect the child with contributory negligence in all cases in which the parent or guardian would in the same situation be barred of a right of action.<sup>3</sup> For example: The defendants, a railroad company, by the negligence of their servants in the course of their employment and the contributory negligence of a person in charge of the plaintiff, a child too young to take care of himself, injure the plaintiff. They are deemed not liable for the misfortune.<sup>4</sup>

811. This doctrine however is not accepted by all the

<sup>1</sup> Identification, in any such sense as making the driver or manager of the vehicle the servant or agent of the passenger, had been already repudiated by Pollock, B., in *Armstrong v. Lancashire R. Co.*, L. R. 10 Ex. 47, 52.

<sup>2</sup> See *The Bernina*, *supra*.

<sup>3</sup> See *Mangan v. Atterton*, L. R. 1 Ex. 239; *Clark v. Chambers*, 3 Q. B. Div. 327; *Waite v. Northeastern Ry. Co.*, El. B. & E. 719; *Hughes v. Macfie*, 2 H. & C. 744; *Wright v. Malden R. Co.*, 4 Allen, 283; *Holly v. Boston Gas Co.*, 8 Gray, 123; *Callahan v. Bean*, 9 Allen, 401; *Pittsburgh R. Co. v. Vining*, 27 Ind. 513; *Lafayette R. Co. v. Huffman*, 28 Ind. 287. The doctrine would, so far as it may be sound, be equally applicable of course to the case of any helpless or imbecile person.

<sup>4</sup> *Wright v. Malden Ry. Co.*, 4 Allen, 283.

American courts, and has often been met by the same answer that has been given to the doctrine of imputing to passengers the negligence of their carriers. The negligence of a parent or custodian of a child, it is well said, cannot properly be imputed to the child; and, supposing the child incapable of negligence, the conclusion is reached that he can recover for injuries sustained by the negligence of another, though the negligence of the child's parent or guardian contributed to the misfortune.<sup>1</sup>

**812.** It is clear that if the child himself be guilty of contributory negligence (supposing him capable of negligence), **Negligence of** apart from the negligence of his parent or guardian, there can be no recovery; and whether the **child.** child be capable of personal negligence is a question of fact, depending upon his age and ability to take proper care of himself.<sup>2</sup> It has sometimes been said that the same discretion is necessary in a child that is required of an adult.<sup>3</sup> This however could only be true, it should seem, in those cases in which the child is sufficiently mature to be able to take good care of himself.<sup>4</sup> In other cases, the better rule is that, so far as the question of the *child's* negligence is concerned, it is only necessary that he should exercise such care as he reasonably can, or as children of the same capacity generally exercise.<sup>5</sup>

**813.** In the case of a child too young to take care of himself, it is held that, if the negligence of the parent or person in charge is the sole proximate cause of the misfortune, the defendant cannot be liable. For example: The defendant, a railway company, is negligent in moving a train along one of

<sup>1</sup> *Evansville v. Senhenn*, 151 Ind. 42; *Bellefontaine R. Co. v. Snyder*, 18 Ohio St. 399; *North Penn. R. Co. v. Mahoney*, 57 Penn. St. 187; *Cases*, 586; *Louisville Canal Co. v. Murphy*, 9 Bush, 522 (Ky.).

<sup>2</sup> *Lynch v. Nurdin*, 1 Q. B. 29; *Lynch v. Smith*, 104 Mass. 52; *Evan-sich v. G. Ry. Co.*, 57 Texas, 126; *Costello v. Third Avenue R. Co.*, 161 N. Y. 317.

<sup>3</sup> *Burke v. Broadway R. Co.*, 49 Barb. 529.

<sup>4</sup> See *Western R. Co. v. Rogers*, 104 Ga. 224.

<sup>5</sup> *Lynch v. Smith*, *supra*; *Western R. Co. v. Rogers*, *supra*; *Costello v. Third Avenue R. Co.*, *supra*.

its tracks. The plaintiff's grandmother, who has bought of the defendant a ticket of passage for herself and the plaintiff, a child, negligently attempts to cross the track in charge of the child, and the child is injured by the train. The defendant is deemed not liable; the defendant having the right to expect that the lady would take due care of herself and of the plaintiff.<sup>1</sup>

**814.** It is however clear that if the fault of the person in charge of the child was not a proximate cause of the misfortune, the defendant, being negligent, will be liable.<sup>2</sup> The parent or other person in charge could recover for an injury done to himself by the defendant's negligence; and a fortiori should a young child, incapable of negligence, be entitled to recover in such a case. And the same would be true of negligence on the part of the child (supposing him capable of negligence) when such fault did not contribute as a proximate cause to the injury. For example: The defendant, a hackman, carelessly runs over a child five years of age, in a city, while the child is crossing a street alone, on his way home from school. The child is not guilty of any negligence further than may be implied from his going alone; in regard to this the child's parent may be negligent. The defendant is liable; the negligence of the child, if there was any in his going alone, and of the parent, if found to exist, not contributing in the stricter sense to the misfortune, since it is not the natural and usual effect of a child's crossing the street that he should be run over.<sup>3</sup>

**815.** Indeed it is not clear that the rule should not be that a child of tender years, that is to say, incapable of negligence, should be able to maintain an action for the injury he has

<sup>1</sup> *Waite v. Northeastern Ry. Co.*, El. B. & E. 719, approved in *The Bernina*, supra, by Lord Esher, 12 P. Div. at pp. 71-75. See 13 App. Cas. 10, 16, 19. This assumes that the defendant's negligence was not also a proximate cause of the injury, as it might be, as where the person in charge of the child, and the defendant, were driving negligently and came into collision. But there is ground for doubt still in regard to *Waite's Case*.

<sup>2</sup> *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317, 323.

<sup>3</sup> *Lynch v. Smith*, 104 Mass. 52.

sustained in cases of this kind, though the person in charge was guilty of contributory negligence. It might be considered enough that the defendant's act or omission was (though not the sole) a proximate cause of the damage. And the principle of the recent decisions above referred to in regard to passenger and carrier appears to sustain the view that if the negligence of each of the persons concerned is, as it might well be, a proximate cause of the injury to the plaintiff, both of them are liable.

**816.** If the parent sue for himself, upon the relation of master and servant, for loss of service, the question is somewhat different. If the child be incapable of negligence, the question will be whether the parent's negligence contributed in the stricter sense to the misfortune; but if the child were capable of negligence, and were in fact negligent, it may be that negligence of his would bar an action against another by the parent, as a master, for loss of service caused, though in part only, by the defendant's negligence.<sup>1</sup>

**817.** The result is, that whatever particular phase a case may present, be it contributory negligence or an intervening agency, the question upon which the defendant's liability turns must be whether his conduct was the (or was a) proximate cause of the damage, or only a condition thereto.

<sup>1</sup> *Marbury Lumber Co. v. Westbrook*, 120 Ala. 179. But compare the action for seduction, ante, pp. 135, 136. See also *Glassey v. Hestonville Ry. Co.*, 57 Penn. St. 172.

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were true; & after notice in writing of  
the intention to do so given to the Plaintiff  
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action may give in evidence, in mitigation  
of damages, that he made or offered an  
apology to the plaintiff for such  
publication before the commencement  
of the action, or as soon afterwards as he  
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Consideration



1. The insulting words and  
well as shaken.

2. The insulting words and words actions  
her se i.e., without proof of special damage.

3. Publication to 3rd person disseminated  
with. It is enough that words were  
shaken or written to Plaintiff.

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